THE SEPARATION OF EXECUTIVE AND JUDICIAL FUNCTIONS

THE SEPARATION OF EXECUTIVE AND JUDICIAL FUNCTIONS

A STUDY IN THE EVOLUTION OF THE INDIAN MAGISTRACY

BY

R. N. GILCHRIST, M.A.,

INDIAN EDUCATIONAL SERVICE; PRINCIPAL, AND PROFESSOR OF POLITICAL ECONOMY AND POLITICAL PHILOSOPHY, KRISHNAGAR COLLEGE, BENGAL.



PUBLISHED BY

THE UNIVERSITY OF CALCUTTA

1923

PRINTED BY BHUPENDRA LAL BANERJEE
AT THE CALCUTTA UNIVERSITY PRESS, SENATE HOUSE, CALCUTTA

Reg. No. 5B, August, 1923—500.

PREFACE

The original preface to this monograph was written in December, 1920. The present preface is dated March, 1923. The gap will explain some apparent discrepancies in the text. The original manuscript was prepared before the Reforms came into being; it was sent to the press soon after the new legislative bodies met for the first time. During the passage of the earlier portion through the press, certain alterations were made to bring the text up to date; but after the first forms were printed off, it was clear that the battle was to be fought over again. In Council after Council the controversy, which had remained dormant during the war and during the preparatory stages of the Reforms, was revived; and, after consultation with Sir Asutosh Mookerjee, then Vice-Chancellor of the University, it was decided to postpone final publication till the Report of the Committee appointed as the result of a Resolution moved in the Bengal Legislative

Council to the effect that steps should be taken to carry the separation into effect, was available. This decision meant a delay of over two years. It was not possible to reprint the earlier forms, and although some anachronisms have been removed, traces of the period of waiting will be evident in both the paper and the subject matter.

The original idea of the monograph was to present in a historical and critical setting a problem which, in the author's judgment, was likely to be apparent when the new Councils found their bearings, and which would require attention in the University classes. Exhaustive historical or critical analysis has not been attempted; the problem indeed involves the whole administrative system of India, which would seem to require a complete overhaul in view of the introduction of semi-responsible Government, and the promise of responsible government of the Dominion type. How far the existing Imperial Services system with its extra-India recruiting authority, and its independence of the legislatures, can be reconciled with responsibility, is a question which raises issues both too wide and too delicate to be discussed here. The issues have already been raised, but by no means exhausted, in the legislatures and the press. A new Public Services Commission is on the threshold of India, but whether it will deal with the principles of

administration is not at the moment clear; but this much can be said with a fair amount of certainty, that sooner or later the fundamental issues must be faced. Decisions, vital and final, must be reached as to whether the Secretary of State is to recruit layer after layer of men for all-India Services, for thirty years' periods of service, when Dominion self-government has been officially given forth as the culmination of the present half-way Reforms; whether Provincial autonomy, now fairly real, can be reconciled with the existence of Imperial Services which perform provincial work; whether the development of local self-government will remove the necessity for the present type of District Officer; whether the present organisation of the permanent Secretariats can continue with the growth of a Cabinet system of government; and whether the expense of England-recruited services is in consonance with the efficiency which the governments of the future may demand. The practical bearings of applied self-determination are multifarious; they are, too, often unexpected, but the rigour of logic will manifest itself. The present study touches on some of the above problems; to work them out is not the present task of the author, though it would have been a most intriguing one.

In conclusion, I would offer my thanks to Sir Henry Wheeler, now Governor of Bihar and

Orissa, who, when Member of the Executive Council in Bengal, very kindly allowed me access to the Government papers on the subject; and to Sir Asutosh Mookerjee, who, as officiating Chief Justice of Bengal, kindly let me see the High Court documents.

March, 1923. R. N. GILCHRIST.

CONTENTS

The Separation of Executive and Judicial Functions

A Study in the Evolution of the Indian Magistracy

I

THE CONDITIONS OF THE PROBLEM

We have just seen the beginning of the new Councils in India. The creation of these Councils marks the biggest constitutional advance India has made. The modified or tempered executive government hitherto prevailing has been replaced by a type of responsible or parliamentary government. More and more the constitution and the internal affairs of India will be moulded and directed by an Indian personnel. Many of the old time-honoured administrative problems will be discussed and settled in a new atmosphere, and to the student of Indian political development not the least interesting aspect of our new system of government will be the changed temper in which problems, hitherto called grievances, will be settled. Hitherto the non-official Indian members of the Legislative

Councils of India have played the part of the party in opposition in the English scheme of things. All parties in opposition are more fractious in their criticism than constructive in their policy. Their part as critics of the party in power, or the government, enables them to demolish, destroy and bring into contempt the efforts of the government. As a non-responsible, non-constructive agency, they are free to indulge in any captious criticism which may turn votes from one side to another. Such criticism, where genuine, is salutary and helpful; but often it is artificial, far-fetched, and embarrassing to the executive. Like the conventional Irishman, an opposition is "anti-everything," whether the measures are good or bad.

Place that opposition in power, and the whole scene is changed. The *ad captandum* phrases and criticisms are forgotten. The old opposition assumes the part and function of their late enemies. The moderating influence of power actually wielded, the responsibility to a majority vote and a public opinion, and the ever-present duty of administration breed a wonderful oblivion of extreme views and social millenia. The grip of the administrative vice is an effective soother of exaggerated and fanciful views. The all-pervading tentacles of a Treasury or Financial Department effectively check magniloquent schemes and make rash promises melt

into thin air. Construction is quickly recognised to be more difficult than destruction. The previous party in power—now in opposition—makes the erstwhile opposition feel the blast of its own icy breezes, and the erstwhile opposition, now in power, finds itself actually repelling the attacks it itself made on its predecessors. . .

So the political game goes on—the ever recurring struggle between the Ins and the Outs; on the one side, the in-genuine criticism, the vote-catching patriotism, the rash promises, the new social ideals; on the other side, the daily, nightly, weekly, yearly, the perpetual working of a huge administrative machine, a machine which, despite renewals and mendings, must continually be oiled, tested, and, above all, kept in motion. Ministers, flitting departmental phenomena, come and go, but the machine goes on for ever. Ministers may mould policy, they may increase or decrease departmental efficiency, but they are there a day, then gone for ever. Others arrive and take their places, perhaps with new ideas and ideals, but soon they come within the grasp of the same vice. The Department rules: nominally a servant, it is really the master. The minister leans on it as an old man on his stick. He becomes a slave to its procedure and traditions. With his fellow ministers he nominally rules the country: but the Department rules him, and, therefore, rules the country.

And no democracy has yet been able to rule departments. Ministers may come who try to break departments: they soon depart, for they themselves are broken in the attempt.

In India the opposition has now become the government in the subjects specially granted by law to ministerial control. With the new government a new opposition will rise up. The struggle will not be the old official *versus* the non-official: it will now be among two (or more) groups of non-officials. Where, in the days now rapidly disappearing, a non-official *bloc* vote could be counted on against the official vote, the new executive, or minister, must depend on his majority on the one hand, and on his department on the other. How the majority will work no one can prophesy, but the departments must go on as before. In general policy the minister will have to lead his followers. He will make new laws for his department to administer, and however virtuous his ideals, he will soon find his policy circumscribed by the mundane considerations of rupees, annas and pice.

One of the subjects on which the non-officials used to vote "solid" was the question of the separation of the executive and judicial. Ever since India, or its individual provinces, began to develop a national conscience, this subject has been urged upon the government as a most pressing reform. Much has been written, and more

spoken on the subject. In this paper I propose to give a short history of the controversy, and ultimately to analyse its importance and bearings. But the study is not one of a single question, *viz.*, the separation of the executive and judicial functions in government: it involves the evolution of the whole of the Indian magistracy. With the wider separation of legisative, executive and judicial I am not at present concerned.[1] On that subject suffice it to say that the only 'separation' that modern democracy has accepted is really a union, or a subordination of the executive to the legislative, in what is known as responsible government. The American non-parliamentary or presidential system has not been accepted by newer democracies. The older British system—the system which is the negation of the theory of separation of powers—has proved a much more acceptable instrument of government to modern democracy.

The present study leads me into historical high-ways and bye-ways of British India, and particularly in the earlier history of the subject, one is struck with the greatness of the administrative problems to be solved, as well as by the great ability of the administrators who solved, or tried to solve them. Their task was more

[1] For this subject see any constitutional history of India, or the Chapters on the Government of India in the author's *Principles of Political Science*—Longmans Green & Co., 1921.

difficult than that of the modern administrators. The modern administrator has to amend, recast, readapt and add to old institutions. The earlier administrator had to *create*. After studying their work and the conditions under which they worked, one must bow to them in respect and gratitude. It is not unusual to praise the past, but the past of India was one of peculiar difficulty and complexity. To *a priori* constitution-makers, of whom there recently has been legion, the task would have been well nigh impossible; but the British administrators were blessed with the strength—and weakness—of their own system, the habit of meeting exigencies as they arise.

The success of the Company is all the more remarkable in so much as the Company was primarily a trading body. Its personnel were merchants, not trained administrators, or even lawyers. The early history of British India in its constitutional aspect is a succession of Charters and renewed Charters, of conditions and revised conditions, of Acts and amending Acts, without any fixed principle. Gradually, as the vastness of the problems and immense possibilities became more apparent, Parliament began to interfere, and certain definite lines of policy were enunciated. Government as Government sprang up out of commercial exigencies, and, ultimately became separated altogether from

commerce. But even before the Company gave way to the Crown, before the Court of Directors was replaced by a member of the British Cabinet, the administrators of the Company had proved not only governors but statesmen. They had laid the foundation of an Indian Empire, and what is now more obvious, of an Indian nation, or, at least, of an Indian nationality. Nor had they to seek for their troubles. In their earlier days they were at the mercy of a somewhat capricious British Legislature. Though they had no public opinion in India to criticise them or hold them responsible for their actions, they were responsible to a more critical tribunal—the House of Commons and the British Courts of Justice. Gradually, as the result of the policies of the Company and the Crown, the centre of responsibility changed. For a British opinion grew up an Indian opinion. For a relatively uninformed public grew up a critic *in situ*, the Indian himself, who, as time passed, became not only a critic but a national voice. From the ruled he was educated to become the ruler, first unofficially, finally officially, for the responsibility of his governors has turned into responsibility to himself.

The question of separation of executive and judicial is really an epitome of the history of the administration of British India. The

controversy started with the servants of the Company. It was continued with the servants of the Crown. It is likely to end in a legislature to which the executive is, in part, responsible. In all probability the question will be solved before complete responsibility is attained: otherwise it would have represented the various historical stages of the evolution of the Indian system of government since the Company came into power.

It will, I think, clear the air somewhat if I first give a rough outline of the present executive and judicial system prevailing in India—the system at which so many shafts have been loosed. As an example I take the province with which I am familiar—Bengal, noting the chief variations existing in the other provinces of India.

The first point to be noted about the present administrative organisation in India is a difference in nomenclature due to a more fundamental difference in the principles of government, a difference which has now practically disappeared. Up to 1834, the method of legislation in India was by Regulations. These Regulations were issued from the three centres, or capital towns of the Presidencies—Fort William or Calcutta, Fort St. George or Madras, and Bombay. The Regulations, in the course of time, became both numerous and complicated. With the extension of the Company's territories, administrative

experience showed that the Regulations drawn up for the older territories were too intricate for the newer and less advanced territories. The territories called the North Western Provinces (or Agra) were placed under the Bengal system, but in other new annexations simpler rules and Codes were drawn up. Thus grew up the distinction between Regulation Provinces (Bengal Madras, and Agra) and the Non-Regulation Provinces. All the more turbulent territories and the more primitive areas were made Non-Regulation provinces. In any one province sometimes part was Regulation, and part non-Regulation, as in the old presidency of Bengal.

This distinction has now disappeared. In the Government of India Act of 1919 all the provinces are lumped together as Governor's Provinces, but the Act contains special provision for what under the old system would have been non-Regulation territories. These are now known as backward tracts, and for them the advanced system of government adopted for the rest of India is not yet suitable. But with advance in education and material wealth, the backward tracts, like the old Non-Regulation Provinces, will come into line with their Regulation sisters.

The old distinction has left traces in the administrative organisations. The differences are partly of fact and partly of name. The

differences of fact presumably soon will disappear. In describing the administrative divisions of India, I take as types the Regulation Provinces, after which I shall note the chief differences prevailing in the non-Regulation Provinces.

In the system under discussion, the heads of the Provinces were till the 3rd January, 1921, Governors in Council in Bengal, Madras and Bombay, and Lieutenant-Governors in Council in the other provinces, the whole, or part of which are Regulation areas. In January, 1921, all these Provinces became Governor's provinces. The old distinction between Governor and Lieutenant-Governor has disappeared. With the Governor is now associated a 'dyarchy.' For the administration of reserved subjects, he has an Executive Council: for the administration of transferred subjects he has Ministers. To suit the new conditions, internal reorganisation has been necessary in the Secretariats, but the general system is the same as in the old administration. Under the Governors and the Ministers are the Secretariats and Departments. Revenue questions are under Boards of Revenue, with its allied departments, except in Bombay where the revenue departments deal directly with the Government. The revenue administration of India partially combines executive and judicial powers; but it is not in the Councils,

the Ministries, the Board of Revenue, the Secretariat or the Departments that the question of separation lies. These various agencies are the ordinary centralised administration common to all governments, and they will continue under the new system of government. They form the permanent administrative departments of government, and, whatever the system of Government may be, they will continue to be responsible for the good administration of the country. It is in the territorial administration that the difficulty of the separation of functions arises.

The basis of the whole of the territorial administration of India is the repeated subdivision of territory. The unit is the district. The district is subdivided into smaller areas, the names of which vary from province to province; and a number of districts may be grouped into a wider unit of administration, the Division. This however is not universal. In Madras the final unit is the District; there are no Divisions, and, therefore, no Commissioners.

There is no set principle for the delimitation of district boundaries. Some are small; some are large. The areas and populations vary exceedingly. Nor do all districts have the subdivisional system; nor is there any uniformity in the area or population of subdivisions. A rough administrative expediency based mainly on

revenue collection is the main guide. Historically, districts have been frequently changed in area, and their subdivisions altered. New districts have been carved out of previously unwieldly districts, and new combinations of districts have been created for the wider unit of the Division, or the unit of police administration, the "range."

The chief district official is the Collector-Magistrate. The evolution of his duties we shall see presently. At present he is responsible for revenue work, and he is also the chief magistrate: his first and main duty is the collection of the land revenue. This duty in Bengal is comparatively simple, because of the Permanent Settlement, by which landlords pay a fixed sum. In Madras and Bombay, where the *ryotwari* system prevails, by which individual cultivators pay the revenue, the work is much more complicated and requires much more time. In Bengal the revenue duties of the Collector are increased by the fact that he is entrusted with the management of many private estates, held by the Court of Wards for minors and others.

The collection of revenue, as his name implies, is the chief duty of the Collector; but in reality it forms only a fraction of the sum-total of his work. His miscellaneous duties are extensive and of a very variegated character. As head of the district he is the agent of government in

all matters. He is responsible for many separate administrative departments, such as excise, income tax, stamp duty, and all new sources of revenue. He is in charge of the District Treasury, which is practically the local bank for government purposes. He has to provide information on all matters connected with the district. He is the chief district statistician. He receives, and forwards, reports on all sorts of subjects from all over his district. In some provinces he adjudicates in rent disputes between tenants and landlords. He is connected with local bodies either directly as President, or indirectly as permanent consultant. In any case in all matters connected with Municipal and District Board government he has to report to and advise the Commissioner or provincial government. The direct control by the Collector of local self-governing bodies, such as Municipalities and District Boards is now rapidly diminishing, owing to the policy of appointing non-official Chairmen. But this policy, where the Chairmen are not trained administrators, leads to internecine strife in these bodies, which ultimately requires examination by and report from the Collector. He is also the responsible district officer in all emergencies, such as floods or famines. The elections have added to his duties by making him a returning officer. In practically every new law, or administrative improvement in the

district, the Collector-Magistrate is somehow involved.

In the earlier years of British administration the Collector's duties were even wider, for new departments have been created which have taken the onus of much departmental work off his shoulders—*e.g.*, the Forest, Public Works, Jails, Education and Sanitation Departments. But in all these matters the Collector is the local chief consultant. If he has not actually to do everything, he must know about everything. His ear must always be open to hear complaints and grievances. His hand must always be ready to help and his voice to encourage. For all these ends he has to tour throughout his district, inspect every kind of institution, talk on all sorts of topics, settle all sorts of quarrels, make all sorts of enquiries, and finally make all sorts of reports to his superiors.[1]

With the growing complexity of modern administration, the Collector more and more is tending to become a post office between the

[1] It is impossible to enumerate the many duties that fall, or may fall to the Collector's lot. An amusing description by a Judge of the Upper Provinces is given in an appendix. Mr. Ricketts's description is a fair representation of the miscellaneous duties that fall to the lot of the District Magistrate. Of course some of the facts have changed but the general truths have not. Mr. Ricketts's letter was written on the 6th August, 1868, in connexion with the training of Civil Servants as Judges. Such letters considerably relieve the tedium of reading through the vast collections of papers and correspondence on the subject.

people of his district and the provincial government. The system of government is tending towards legislative centralisation, with administrative decentralisation. The Collector thus is becoming an interpreter of rules, an issuer and enforcer of orders of the central Government, and, of course, the head of a large staff necessary for such work. At present the rules and orders of government leave him much latitude for personal discretion, but the duties, if more numerous, are tending to become less onerous or responsible. The growing amount of work in the various departments under him has been accompanied by a growth in the efficiency of the officers of these departments, all of which makes a Collector's lot easier.

In addition to all these duties the Collector is a Magistrate. He is responsible for the peace of his district, and to this end he is endowed with wide powers for the prevention of crime under the Code of Criminal Procedure. These powers, it may be noted, have not to any great extent entered the controversy respecting the separation of powers. They are quasi-judicial, it is true, but even extreme controversialists have not proposed to divest him of them. The magisterial powers are of three kinds, first, second, and third grade. The Collector is a first grade magistrate, and, as such, hears appeals from lower grade magistrates. His judgments

are subject to appeals in the Sessions Courts. He has also certain judicial functions in relation to revenue collection, but these functions are now practically completely of an administrative nature, the more legal cases going to the Civil Courts. His revenue-judicial functions, like his semi-judicial preventive' functions have not been prominent in the Executive-judicial controversy. The Collector also supervises the work of his subordinate officers. This, indeed, is one of his most important duties.

The executive control of the police is in the hands of the Superintendent of Police. As a rule he is a European officer of the Indian Police Service, though recently a number of Indians have been promoted to the same status. The Superintendent of Police is responsible for the discipline and internal management of the police, and in these matters is responsible to his own departmental superiors, the Deputy Inspector General and the Inspector General. In all other matters—in matters of the prevention and detection of crime, in preparing cases, etc.—he works in close co-operation with the District Magistrate. In the older stages of the controversy the Magistrate-Collector was much more intimately connected with Police work than he is now. Till the present organisation of police was started, the magistrate was personally responsible for all police work. With

the introduction of the present post of District Superintendent of Police, this position was materially altered, especially when this post came to be filled regularly by officers recruited for the Indian Police Service. The efficiency of these officers, and the police system gradually built up under them, made the magistrate's interference less necessary, and it may be added, less welcome. The Police became the prosecutors, and traced evidence and committed persons for trial practically by themselves. Indeed so far back as the days of Sir George Campbell, who placed the Police Superintendent in strict subordination to the Magistrate Collector, there was a growing antagonism between the magistrate and police, which has not by any means disappeared. The police are recruited from the same class—both in India and in England—as the Indian Civil Service, and they have their own pride in efficiency, and their own *esprit de corps*. The Police Commission of 1902 expressly hoped that magisterial interference with the police would gradually cease, but the Decentralisation Commission adopted the opposite view. In practice the views of the Police Commission are tending to be realised.

In all the Regulation provinces save Madras, districts are grouped into divisions, the head of which is the Divisional Commissioner, or

simply, the Commissioner. In Madras the final unit is the District, and the Magistrate-Collector, therefore, is the head of the territorial hierarchy. The number of Districts in a Division varies from four to six. Commissioners date from 1829, from the days of Lord William Bentinck. They first were judges as well as administrators, but their judicial duties later were transferred to the District Judges. Their duties now are the same in kind as, but different in degree from those of the Collector. They are intermediaries between the Collector and the provincial government.

For administrative convenience districts are divided into subdivisions. These subdivisions are under Subdivisional officers, who are members of the Indian or Provincial Civil Services. Smaller charges are under officers of the Subordinate Civil Service. These subdivisional officers exercise the same kind of powers as the Magistrate-Collector, though the powers are more restricted. They are really Magistrate-Collectors on a small scale. The Subdivision is a replica of the district headquarters. It has its court house, sub-treasury, sub-jail, etc. The subdivisional officer is also a touring officer, for subdivisions are divided into smaller areas the names of which vary from province to province (taluks, thanas, tahsils), each under its own head (talukdar, tahsildar, etc.).

There are still smaller divisions, and minor officers, down to the village headmen and chaukidars. It may be noted that the village headmen 'unite' powers—for they collect revenue, act as magistrates, and also are petty civil judges.

In the Non-Regulation provinces and Non-Regulation districts of the Regulation Provinces there are some variations of the above system. The heads of the Provinces (Lieutenant-Governors or Chief Commissioners under the old system: under the new Act of 1919 they have become "Governors") their councils, ministries and Secretariats are much the same in position and authority as in the Regulation Provinces. The body of officials composed in other provinces of members of the Indian Civil Service is known as the Commission (*e. g.*, the Punjab Commission, the Burma Commission). Except in Oudh, which is under the Board of Revenue of the United Provinces (the old North Western Provinces) there is no Board of Revenue in the Non-Regulation Provinces. In Burma and the Punjab its place is taken by the Financial Commissioner; in the Central Provinces the Commissioners of divisions and revenue departments deal directly with the provincial government. The Collector in the Regulation Provinces is known as the Deputy Commissioner in the Non-Regulation. Assistant

Magistrates and Deputy Magistrates of the Regulation are known respectively as assistant Commissioners and extra-assistant commissioners in the Non-Regulation Provinces. The functions and powers of each are very much the same though the names are different. The chief difference between the two lies in the judicial organisation. The criminal powers of Deputy Commissioners are considerably wider than those of Collectors. There is much more combination of powers, and far less division of functions between the Executive and Judicial branches of the Civil Services. Commissioners in Burma, too, are the chief Civil and Sessions Judges. But gradually the separation is being effected which is common in the Regulation Provinces. The head Courts used to be Chief, not High Courts, but it is merely a question of time as to when there will be a complete series of High Courts. Already in the Punjab the Chief Court has been replaced by a High Court. In Upper Burma, the Central Provinces, Oudh, and Sind (the Non-Regulation area of the Bombay Presidency) the functions of the Chief or High Courts are performed by officials known as Judicial Commissioners.

So much for the executive administration. The judicial administration of India follows similar lines. At the head of the judicial system are the High Courts, or their equivalents,

Chief Courts, and Courts of Judicial Commissioners. The Privy Council, of course, is the final court of appeal. With these higher Courts, as with the Government Secretariats, the controversy of Executive and Judicial is not primarily concerned. The lower Courts are divided into two branches—District and Sessions Courts and Magistrates' Courts. The arrangement of the District and Sessions Courts is based on the same principle as that of the general administration. Normally in every administrative district there is a District and Sessions Judge. (Each Province is divided into sessions areas for higher criminal jurisdiction --these areas need not be co-terminous with those of administrative districts. In practice they usually are co-terminous with the district.) The procedure of these courts is, on their civil side, governed by the Code of Civil Procedure, and, on their criminal, by the Code of Criminal Procedure. Below the District and Sessions Judge, for civil work, are the courts of subordinate judges and munsiffs. In the non-Regulation provinces, as we have seen, civil judicial work is frequently done by executive officers. With none of the purely civil functionaries does the difficulty of separation arises. The difficulty arises in the organisation of the inferior criminal justice. In the districts there are two types of criminal court—The Sessions Courts

and the Magistrates' Courts. The Sessions Courts are presided over by the Sessions Judge, or, as his full designation is, District and Sessions Judge. With him may be associated additional or assistant Sessions Judges. These courts are fixed at district headquarters, and try all cases committed to them according to the Code of Criminal Procedure, and they may inflict any punishment according to law, the death sentence alone requiring the confirmation of the provincial High Court, or its equivalent.

Below the Court of the District and Sessions Judges, are, for criminal work, the courts of the magistrates. The presiding officers in these courts, as we have seen, are the Magistrate-Collectors, additional magistrates, assistant and deputy magistrates, all of whom are executive officers. The Code of Criminal Procedure defines the various classes of crime which may be tried by the various grades of magistrate. The powers of the first grade magistrate are to pass sentences of two years' imprisonment, or a fine of Rs. 1,000; of a second grade magistrate, six months' imprisonment and a fine of Rs. 200, and a third grade magistrate, one month's imprisonment and a fine of Rs. 100. First class magistrates may commit serious cases to the sessions. In Non-Regulation provinces special magistrates, invested with special powers, may be appointed for special cases. There are also Honorary

magistrates for trying petty criminal cases. Their decisions as a rule are subject to appeal in the Subdivisional officers' Courts.

In the Presidency towns the functions are separated. There are special courts—such as small cause courts, for civil, and the courts of Presidency magistrates, for criminal work.

In the Regulation provinces, therefore, the Courts are arranged thus:—

Criminal and Civil.	Civil only.	Criminal only.
High Courts. District and Sessions Courts.	Courts of Subordinate Judges. Munsiff's Courts.	Courts of Collector-Magistrates, Assistant and Deputy Magistrates. Courts of Subordinate Magistrates with Second or Third Class Powers.

In the Non-Regulation Provinces the executive officials are civil and criminal judges, except at the summit, where there is the division into the Chief Courts or Courts of Judicial Commissioners, and the Secretariat. In Presidency towns there are special courts for both civil and criminal work.

Without entering into more detail regarding the administrative and judicial organisation of India, I may make special note of one or two points in connexion with that organisation, which will help to explain what follows.

1. In theory each magistrate is head of the police in matters concerning crime, and the detection of crime, and at the same time he is a criminal judge. In practice, however, magistrates try very few cases themselves. The percentage, as we shall see, was very small in Lord Ripon's time. It is even less now. Such judicial work as the magistrate does is usually confined to the hearing of applications for revision, and of appeals in petty cases, from magistrates of the two lower classes. He does not hear complaints, nor does he even distribute cases. Such work is usually performed by the Joint Magistrate, if there is one, or by the senior deputy magistrate. Such is the case in Bengal, and, largely, in other provinces. In Non-Regulation areas Magistrates also have the civil powers of a subordinate judge, but even where such a system exists subordinate judges are usually appointed to do the actual work. Only in very exceptional cases the magistrates in these areas do civil judicial work.

2. In the Indian judicial system there is an elaborate provision for appeals in criminal justice. An appeal lies from the convictions of second and third class magistrates to first class magistrates. Thus a Magistrate-Collector acts as an appeal judge. Any specially empowered magistrate with first class powers may hear those appeals. Original convictions by first class

magistrates, with certain reservations, are liable to appeal in the Sessions Court. The finality of appeals, as in all judicial systems, is arranged according to the courts and cases. From original convictions in the Sessions Courts appeal lies to the High Courts. A High Court may call for the record of any subordinate court, and pass judgment on the legality of the judgment, correctness of the procedure, and general propriety of the trial. Acquittals are usually final, but the provincial government may appeal against an acquittal and demand a retrial. The elaborate appeal system in vogue is a relic of older days, which, in the words of the late Justice Carnduff, were marked by the "inferior social standing of the native judiciary of the lower grades; the imperfect legal training of all the judges in early days, the general want, so far as the mofussil is concerned, of the wholesome restraint exercised by a strong bar, and the absence of public opinion and an intelligent press."

3. The District Magistrate, as we have seen, is a touring officer. He inspects all the work of the subordinate magistrates, but such inspection does not imply interference in actual cases under trial. His supervision is exercised over such points as faults in procedure, procrastination or postponement of cases, and past errors of judgment. His interference in cases under trial is confined to the prompt disposal of the case:

it does not concern the verdict to be given. He also reports regularly to the provincial government on the work of his subordinates.

4. The relations of the High Court to the District Judges are that in purely judicial matters judges are under the High Court, while in matters of transfer, personal misconduct, undesirable relations between officers, and such like, judges are under the executive government. The practice has grown up, however, of the provincial government consulting the High Court in matters of judicial appointment and transfer. The opinion of the High Court is always taken on promotions to the higher grades of the services. District Magistrates must not enter into correspondence with judges on the merits of cases, or cavil at their judgments. If District Magistrates have grievances, they must take the advice of the Legal Remembrancer, and, if necessary, refer the matter to the High Court.

The same general rules apply in regard to the provincial judicial service. Originally the appointments were made on the nomination of the High Court, but the provincial government used its own discretion in promotions, transfers, etc. Now, however, the High Courts control practically all matters regarding transfers, promotion, etc. Munsiffs are nominated by the High Court. The Commissioner and District Magistrate have no power over these services.

5. The personnel of the magistracy and judiciary are an important point. Generally speaking, District and Sessions Judges are members of the Indian Civil Service, which used to be purely European, but which has now a large Indian element, and which in the course of ten years will be practically half European and half Indian. The same is true of the Magistrate-Collectors. They are normally members of the Indian Civil Service. In recent years in both judicial and executive work Indians of the lower services have taken a large proportion of these posts normally reserved for the Indian Civil Service. The Indian Civil Services as a whole are by no means "preserve" for Europeans, as a glance at any Civil List will show. In the earlier days of the judicial executive agitation, however, the Indian Civil Service was mainly European, and this fact was not without importance in the agitation.

6. The system at present in vogue for the selection of judges in the Services varies from province to province. In the Non-Regulation provinces there is no set principle, as the functions are united. In the older provinces, however, since 1873, the Indian Civil Service has been divided into two branches, the executive and judicial. The young Civilian, on coming to India, is placed under an experienced Collector for about two years, as an Assistant Magistrate.

Immediately on joining his work, he becomes a third grade magistrate. During these two years he is trained in the various duties of the Magistrate-Collector—judicial, revenue, police, miscellaneous. He also has to submit records of cases to the provincial government and pass departmental examinations in law, accounts, and languages. After some two years' service he becomes a sub-divisional officer or officiating Joint-Magistrate, exercising the normal functions of the office. From this he passed on either to a joint-magistracy, which is practically the same as a Collectorship, or to a judgeship (District and Sessions) on an officiating basis. After a few years' service (the old rule used to be twelve; now it is about six) he is called on to choose either the executive or the judicial branch of the service. The final selection of officers for the judicial branch is made by the provincial government, whose decision is based on advice from the High Court, the officers' qualifications and wishes, the necessities of the public service, and actuarial considerations. Once an officer is selected for one branch he must stick to it. In Bengal at present an officer of the I.C.S. is confirmed as a judge where he has been some ten or twelve years in service.

7. A very important point to note is that there is a more complete union of powers *actually* in sub-divisional officers than in the magistrates of

districts. The sub-divisional officer actually performs the work, the District Magistrate only theoretically performs the work. The sub-divisional officer, moreover, is subordinate to the District Magistrate, and this subordination in cases has undoubtedly led to the interference by the magistrate in his double capacity with the sub-divisional officer in *his* double capacity. It may be noted, however, that the sub-divisional officer exercises no authority over the police, save that, according to the Code of Criminal Procedure he may direct an investigation to be carried out by any officer in charge of a local police station. (Joint-Magistrates and senior Deputy Magistrates at headquarters are very much in the same position. Other subordinate magistrates have nothing to do with police investigations, complaints, or criminal administration generally.) The burden of the attack in the executive-judicial controversy has often been directed more against District Magistrate-Collectors than against the system as a whole, a fact which is proved by the relatively few instances in which the sub-divisional system, where actually union is most pronounced, has been arraigned.

8. Finally it is to be noted that in the actual work done—I speak of Bengal—the spirit of separation exists. No definite theory of separation has been carried into effect. The system of appointing Additional Magistrates, for example,

though thought by some to be a first instalment of separation, was really instituted to relieve District Magistrates of part of their work in heavy districts. But magistrates not only observe the spirit of separation, but actually they are forbidden by the Code of Criminal Procedure to try cases in which they personally are interested as prosecutors. This last point is especially to be noted, as it is a typical legal curb on the Magistrates. In practically all his work the Magistrate-Collector is circumscribed by law or administrative rules, so that legally his chances of abusing his power are small.

The various arguments, both of fact and of fancy, which have been used by the controversialists of both sides will unfold themselves in due course. In the meantime it is well to remember these salient points in the existing system, and to compare them not only with the older and newer attempts at government and with the theories of Indian government, but also with the arguments which from time to time have been brought against the system.

II

THE HISTORY OF THE PROBLEM

The system of government prevailing when the East India Company took over the administration of Bengal, was somewhat inchoate. The police duties were performed by village chowkidars and the zemindars. Each zemindar had his own establishment, and, doubtless his own methods for preserving peace and order. Crimes and misdemeanours were tried in criminal courts, or Faujdary Adalats, the proceedings of which were superintended by the officials who collected the land revenue, or, as they came to be known later, Collectors. In 1775 Warren Hastings made over the whole of the criminal administration of Bengal to the Nawab Nazim of Murshidabad. This system, however, was short-lived. In 1781 Faujdars and thanadars (the latter controlled the criminal administration of thanas) were abolished, and criminal justice was given over to the judges of the civil courts. The English judges of the District Civil Courts, or dewani adalats, were made magistrates. In 1790 Circuit Courts were established, the superintendence of these courts being vested in English judges, assisted by Bengalis who were proficient in Moslem law. In Regulation IX of 1793 the organisation of

criminal justice was systematised. Zilla or district civil judges were endowed with magisterial powers. Their criminal jurisdiction was made co-extensive in area with their civil jurisdiction. Similar powers were conferred on the civil judges of the cities of Patna, Dacca and Murshidabad. Thus the civil judge was also the magistrate. By Regulation XXII of 1793 the police was also placed under the control of the magistrate or civil judge. The old zemindari police system was abolished, darogas being appointed in place of the zemindari officials, and the district authority was centralised in the hands of the judge-magistrate.

This centralisation of executive and judicial authority did not pass without protest, and the protest came from the highest authority in India, Lord Cornwallis, the Governor-General. In the Preamble to Regulation II of 1793, the following passage occurs—

"All questions between Government and the landholders respecting the assessment and collection of the public revenue, and disputed claims between the latter and their raiyats or other persons concerned in the collection of their rents, have hitherto been cognisable in the court of Maal Adalat, or Revenue Courts. The Collectors of the Revenue preside in these Courts as Judges, and an appeal lies from their decision to the Board of Revenue, and from the decrees of

that Board to the Governor-General in Council in the Department of Revenue. The proprietors can never consider the privileges which have been conferred upon them as secure whilst the revenue officers are vested with these judicial powers. Exclusive of the objections arising to these Courts from their irregular, summary and often *ex parte* proceedings, and from the Collectors being obliged to suspend the exercise of their judicial functions whenever they interfere with their financial duties it is obvious that, if the Regulations for assessing and collecting the public revenue are infringed, the revenue officers themselves must be the aggressors, and that individuals who have been wronged by them in one capacity can never hope to obtain redress from them in another. Their financial occupations equally disqualify them from administering the laws between the proprietors of land and their tenants. Other security, therefore, must be given to landed property, and to the rights attached to it before the desired improvements in agriculture can be expected to be effected. Government must divest itself of the power of infringing, in its executive capacity, the rights and privileges, which, as exercising the legislative authority, it has conferred on the land-holders. The revenue officers must be deprived of their judicial powers. All financial claims of the public when disputed under the Regulations, must be subjected to the

cognisances of the Courts of Judicature, superintended by Judges who, from their official situations and the nature of their trusts, shall not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land, and also between the latter and their tenants. The Collectors of Revenue must not only be divested of the power of deciding upon their own acts, but rendered amenable for them to the Courts of Judicature, and collect the public dues subject to a personal prosecution for every exaction exceeding the amount which they are authorised to demand on behalf of the public, and for every deviation from the Regulations prescribed for the collection of it."

This protest is directed mainly at the combination of judicial and executive powers in revenue officers, but as already noted, the weight of argument in later years did not turn on this point. The organisation of the revenue system for good reasons did not figure largely in the controversy. At the time of Lord Cornwallis the interference with the revenue courts by the Civil Courts was a very vexed question. The Regulating Act of 1773 had established a Supreme Court at Fort William, but it did not define the relations of the new Court to the executive. The new Supreme Court interfered with the revenue collection in such a way

as to make good government almost impossible. In 1781 the Governor-General and his Council were exempted from the jurisdiction of the. Supreme Court. The Company's Courts were definitely recognised, and both revenue collection and the Regulations were placed outside the jurisdiction of the Supreme Court. But the Company's courts were definitely recognised, and both revenue collection and the Regulations were placed outside the jurisdiction of the Supreme Court. But the Company's courts proved as eager to intervene in revenue matters as the Supreme Court, and the Governor-General had to solve the problem in such a way as to secure the revenue and at the same time guarantee justice.

Lord Cornwallis first took the side of the executive. In 1787, when Collectors of land revenue were made zilla judges, revenue cases were transferred to them in their dual capacity, a right of appeal lying to the Board of Revenue or to the Governor-General in Council. Acting on the changed opinion of Lord Cornwallis as expressed in Regulation II of 1793, the Government deprived Collectors of their judicial powers, and made them amenable to the civil courts. After a century of wrangling this question may be said to have solved itself automatically. At the present time the position is that the civil courts do not interfere in the purely fiscal side

of revenue collection, but all questions of title to land are now dealt with by the civil courts. Rent suits, notably in Bengal, are tried by the civil courts, though revenue courts still deal with them in some other parts of India. Where revenue courts exist the procedure is similar to that of civil courts, and, in cases, questions of title may be referred from the revenue to the civil courts.

The protest of Lord Cornwallis bore little fruit in regard to the general question of separation. As has been noted, two Regulations of the same year, 1793 (Regulations IX and XXII), completely amalgamated executive and judicial functions under the civil judge. In 1797 the amalgamation was extended, as the judges were empowered to employ their assistants and registrars on magisterial duties. In 1807 the judicial powers of judge-magistrates were still further extended. In 1810, by Regulation XVI, persons other than civil judges could be appointed district or city magistrates. The same Regulation empowered the Governor-General in Council to make rules as to the concurrent jurisdiction of civil judges, where it was found necessary, under the name of joint magistrates, and to appoint assistant magistrates. These assistant magistrates were to form an entirely different set of officials from the registrars and assistants of the civil judges, whom the civil judges had

previously been authorised to employ on magisterial duties. This Regulation, therefore, marks the beginning of the separation of functions. By it civil functions were separated from criminal functions. The first 'conjunction' of powers was civil and criminal, not revenue and criminal, as in the present system.

The shadow of separation cast in 1810 did not extend far; for by Regulation IV of 1821 the Governor General in Council was enabled to authorise a Collector or other revenue officer, to exercise the whole or part of the powers and duties vested in the magistrates or joint-magistrates, or to employ on revenue duties a magistrate, joint-magistrate or assistant-magistrate. Although not definitely stated in this Regulation, it seems that it was actually contemplated to combine the offices of the magistrate-collector and civil judge in one person. This Regulation remained in abeyance till 1829. In that year the police was re-organised. The post of Superintendent of Police was abolished and the supreme police powers were vested in an official now to be known as the Commissioner of Revenue and Circuit.

Thus the early Regulations of the Company combined the various powers in a very marked degree. The original district official was the magistrate. His primary function was to preserve order, and for this purpose he was the head

of the police of the district. In order to improve criminal administration, about which the Company had many complaints, the magistrate was also made a judge for criminal cases. Originally his functions were looked on as a subsidiary part of the duties of the civil judge. Gradually his powers and jurisdiction were extended and these powers created a new class of officials. These officials, like the magistrate himself, combined in them the various functions of government, although in practice their work may have been confined to separate functions. The civil judicial functions were cut off from the many other duties of administration. The other duties, the chief of which were revenue collection, police administration and criminal judical work, were concentrated in the magistrate-collector.

In 1837 a committee was appointed to enquire into the police system. Many complaints had reached the Government from landowners and indigo-planters regarding the unsatisfactory condition of the police system of Bengal. In 1838 this committee, the outstanding member of which was Mr. F. J. Halliday, afterwards Sir Frederick Halliday, first Lieutenant-Governor of Bengal, submitted a report. The members of the committee did not agree on all points. The majority recommended that the offices of magistrate and collector should be split up. The ground of their recommendation was not that

revenue and magisterial functions should not be united in one person as a general principle, but that the existing officers neglected their police and magisterial duties in favour of their revenue work. In the old system, the committee pointed out, the judge and magistrate had paid particular attention to the police duties, but under the system of magistrate-collectors the police duties had become of secondary importance. Their recommendations were that each district should be divided into sub-divisions and that deputy magistrates should be appointed with magisterial powers and given control over the local police.

Sir Frederick Halliday did not agree with the majority. In a minute of dissent he strongly urged the separation of police and magisterial functions on the ground of the recognised principle of jurisprudence that the separation of the judicial from the executive was a necessary element in good government. He declared that to combine the duties of a judge and a sheriff or of a justice of the peace and of a constable in the same individual was both absurd and mischievous. No magistrate should have a previous knowledge of the case on which he is to pronounce a verdict as a judge. The duty of preventing and detecting crime therefore, he said, should be thrown upon the police. There should be a separate organisation to catch thieves and to try thieves. Sir Frederick supported his theory

by a comparison of English conditions, in which connexion he wrote:—

"In England a large majority of offenders are, as here, tried and sentenced by the magistrates: but in the former country the cases so tried are comparatively of a trivial and unimportant nature. In India the powers of the magistrates are much greater; their sentences extend to imprisonment for three years, and their jurisdiction embraces offences which, both for frequency and importance, are by far the weightiest subject of the criminal administration of the country. The evil which this system produces is twofold: it affects the fair distribution of justice and it impairs, at the same time, the efficiency of the police. The union of Magistrate with Collector has been stigmatised as incompatible, but the function of thief catcher with judge is surely more anomalous in theory and more mischievous in practice. So long as it lasts, the public confidence in our criminal tribunals must always be liable to injury, and the authority of justice itself must often be abused and misappied. For this evil, which arises from a constant and unavoidable bias against all supposed offenders, the power of appeal is not a sufficient remedy: the danger to justice, under such circumstances, is not in a few cases, nor in any proportion of cases, but in every case. In all the magistrate is constable, prosecutor, and judge. If the appeal

be necessary to secure justice in any case, it must be so in all: and if—as will follow—all sentences by a Magistrate should properly be revised by another authority, it would manifestly be for the public benefit that the appellate tribunal should decide all cases in the first instance. It is well known, on the other hand, that the judicial labours of a Magistrate occupy nearly all his time, that which is devoted to matters strictly executive being only the short space daily employed in hearing *thana* reports. But the effectual management of even a small police force, and the duties of a public prosecutor, ought to occupy the whole of one man's time, and the management of the police of a large district must necessarily be inefficient which, from press of other duties, is slumed over in two hasty hours of each day. I consider it then an indispensable preliminary to the improvement of our system that the duties of preventing crime and of apprehending and prosecuting offenders, should, without delay, be separated from the judicial function."

Sir Frederick's contentions were supported by two other members of the committee, Mr. Bird, the President, and Mr. Lowis. The strongly worded views of Sir Frederick are interesting enough in themselves, but doubly interesting when compared with a minute written by him in 1854 in which he made a complete *volte face.*

The real interest of these early controversies is that they show the honest desire of the early administrators of Bengal to organise a system of government which was at once consistent with western notions of administration and law, and at the same time effective among an eastern people. In 1886 the first battle in this subject was fought on the Congress platform. In 1899 the well known memorial of Lord Hobhouse and others was presented to the House of Commons, but half a century before the question became a "platform" of the Congress party, the servants of the Company among themselves exhausted their words, and often their tempers, on the same controversy. Long before legislative councils were envisaged, the civil servants of the first half of last century accepted the theoretical correctness of the juristic view of separation. By the strange irony of circumstances, we are now on the verge of a union they little dreamt of—the 'union' of legislative and executive, the executive being subordinate—while the question of the separation of executive and judicial is still unsolved.

Sir Frederick's proposals, as against those of the majority, were to take away the judicial from the executive functions of the magistrate. The judicial functions, he proposed, should be given to civil and criminal judges, and the executive functions to the police. He also

recommended that the revenue functions should be separated from magisterial functions. His later views—views expressed when he was in a position to enforce them—were the opposite of his earlier views. Like many another official before and after him, he was confronted with the rift between what is theoretically correct and what is practically advisable. He chose what, in the views of almost all his leading officials was practically advisable. Nevertheless, his earlier arguments remained sound, and they have often been quoted against the system of which later he was the chief sponsor.

On the recommendations of the Police Committee the offices were separated as vacancies arose in Patna, Murshidabad, and Midnapore. It was not without misgiving, however, that the Governor-General, Lord Auckland, and the Court of Directors accepted the change. In a letter to the Court of Directors, Lord Auckland said:

"The question of gradually separating the office of Magistrate from the Collectorships of the several districts of the Bengal Presidency is now under my earnest deliberation. It is one of great difficulty not merely on financial considerations, but with reference to the very doubtful points, whether in the present state of the covenanted service, a Judge, a Magistrate and a Collector of adequate ability could be allotted to each

district in the Lower Provinces, until, at any rate, existing operations under the Resumption laws be brought to a close, and, secondly, whether the small number of highly competent functionaries of grades below the judicial Bench being taken into account, the Police would, on the whole, be benefited by a division of labour which would assign a large proportion of those best qualified to administer it with effect to the Revenue Branch of the Service exclusively."

The Court of Directors gave a general assent to Lord Auckland's opinions, and actions. The Lieutenant-Governor of the North-Western Provinces had expressed strong views against the separation of functions. Nevertheless, the process of separation went on. By 1845 the offices were separated in practically all the lower provinces with the exception of three districts in Orissa, and several independent joint magistracies. Deputy magistrates were established in 1843.

The separation was short-lived. The first attack made against it was by Lord Dalhousie, the Governor of Bengal, and also at that time Governor-General of India. During Lord Dalhousie's tenure of office the administration of Bengal was separated from that of India. Sir Frederick Halliday was appointed Lieutenant-Governor of Bengal. On laying down the governorship of Bengal, Lord Dalhousie addressed a

long note to Sir Frederick on the system of administration in Bengal.

Lord Dalhousie's minute was based on a note by Sir Cecil Beadon, then Secretary to the Government of Bengal, afterwards Lieutenant-Governor of Bengal. In 1853 Sir Cecil reviewed the administrative position in respect to the separation of the functions of the Magistrate and Collector. "The experience of the past fifteen years," he wrote, "has led many to the conclusion that without gaining anything by the change, for the isolated cases of effective police administration are not more numerous now than they were before, we have reaped all the evils which Lord Auckland and the Court of Directors foresaw when yielding a reluctant assent to the separation of the two offices. We have suffered a grievous loss of power by maintaining a separate class of Collectors, charged with special duties insufficient to occupy their time and yet inhibited from rendering assistance to the other great branch of Executive Government. And we have a class of Magistrates, overworked, underpaid, with limited experience, energetic and zealous, it is true, but commonly wanting in the discretion which is only gained by experience, and frequently so young as not to command the respect of either the Native or European community, and to afford a plausible pretext for the vulgar objection urged

against the Government of employing boy Magistrates."

The collection of land revenue, said Sir Cecil, had become a matter of routine, and, especially where the land was permanently settled, there was not sufficient work to take up the time of a highly paid Collector. Not only so, but the work of the Collector did not bring him into close touch with the people. His main duties were supervisory, and those duties were not heavy where the revenue was paid directly into the Government treasuries without the intervention of intermediate officers such as tahsildars. The Collector, however, from his duties and position, possessed great personal and official influence with the zemindars, and, observed Sir Cecil, this power might be used to further the cause of law and order, whereas under the existing system it either remained barren or was actually used to thwart the work of the magistrate. The resources of the Government in personnel were not so great that they could afford to have senior Civil Servants occupying their time with routine duties. The arrangement, moreover, was objectionable from another point of view. In their earlier years of service the young company officials were entrusted with wide and responsible powers. They were the local representatives of the Government, or, more correctly, they *were* the

local Government. After their judicial and administrative training, they became revenue collectors, or office automata, in which posts their time was insufficiently occupied and their energies rusted till their turn came for promotion to the judicial bench. . .

Sir Cecil did not attach any importance to the argument of the Police Commission that Collectors of revenue might call in the police to their aid. No such instance had occurred in the North Western Provinces, where there had been no separation, and where, it may be added, there was no Permanent Settlement. In Bengal the Permanent Settlement made every man's dues clear and, with the right of appeal to the Commissioner or the Civil Courts, there was no question of the Collector being able with impunity to adopt questionable methods in his work.

Sir Cecil outlined a practical scheme in support of his contentions. The main features of the scheme were that at the head of each district there should be a chief executive officer, called either magistrate or collector, responsible to the Commissioner. This officer should have authority over every executive department in the district—revenue, minor criminal justice, police, registration, public works, education, jails. This officer should have an adequate staff of covenanted and uncovenanted assistants. In one or more districts there should be a European

judge, who would be responsible for civil and criminal justice. The judge should be responsible to the Sudder Court, but he was to be liable to have his executive arrangements and his supervision over lower judges controlled by the Commissioner. Both the Collector or Magistrate and the Judge thus were to be under the Commissioner. Sir Cecil also suggested that in every district there should be one or more covenanted assistants, who might be employed partly by the magistrate for executive work, and partly by the judge, as assessors or assistant judges. This would ensure a proper training for young Civil Servants, and, in time, Government would select them for either judicial or executive work as the inclinations and abilities of individuals warranted. The officers on the executive side would rise to be Commissioners; those on the judicial to the Sudder Bench. But Sir Cecil suggested that this should not be an absolute rule. Executive officers might become judges, and judges Commissioners.

One of the most interesting parts of Sir Cecil Beadon's note is his formulation of a definite theory of government for India. His theory converted his chief, Sir Frederick Halliday, and is interesting as a definite acceptance by an administrative officer of what may be called the oriental theory of administration. In Sir Cecil's own country the absolute theory had long since

been abandoned, and we find no traces in his statements of the possibility of India evolving from an absolute to a democratic system of government. Indeed few officials of his time envisaged a future India managed by Indians on the advanced administrative principles of the west. Occasionally a leading official, such as Sir Thomas Munro of Madras, recognised the possibility of evolution in Indian affairs: but even where western principles of jurisprudence were advocated, they were advocated as solvents to what were regarded as permanent and stationary problems of administration. Educational reformers, it is true, saw further, and, as we shall see, it was the result of their efforts that made the problem of separation of functions more acute, for the rise of an enlightened and able Indian bar made the problem of securing well trained and efficient judges more pressing than ever.

"The chief duties of covenanted English officers in this country," wrote Sir Cecil Beadon, "are those of superintendence and control. Such duties are best and most effectually exercised for the common weal when centred in one authority within a given tract of country. The principle, which holds good of a local governor in the Presidency which he governs holds equally good of a Commissioner within his Division, and of a Magistrate and Collector (or, as he would more

properly be called, a Deputy Commissioner) within his district, and the principle is capable of further advantageous extension to local sub-divisions of convenient extent like tahsildaries in the North Western Provinces, or those under Deputy Magistrates and Collectors in Bengal.

It has always appeared to me that the further we have departed from the Indian system of centring all executive control within a given tract of country in the hands of one man we have weakened our hands and frittered away the administrative force, which, centred in one responsible officer, can be far better and more effectually exercised for the protection and improvement of society, than when under the specious argument of a division of labour, the same force is divided between two independent and frequently antagonistic departments.

. . . . It seems to me that the true theory of Indian Government ....is the entire subjection of every civil officer in a division to the Commissioner as the head of it, and the entire subjection of every officer in a district to its executive chief."

Sir Cecil recognised the validity of the argument for a separation of judicial and executive functions thus—

"The only separation of functions which is really desirable is that of the executive and the judicial, the one being a check upon the other,"

and, he continued, with reference to the problem before him, "If the office of magistrate and collector be reconstituted on its former footing, I think it will have to be considered whether the power of a criminal judge now vested in the magistrate extending to three years' imprisonment with labour in irons might not be properly curtailed, whether the magistrates should not be required to make over the greater portion of their judicial duties to qualified subordinates, devoting their own attention chiefly to police matters and the general executive management of their districts, and whether the moonsifs under an improved and simplified Code of Criminal Procedure might not be charged with the trial and decision of summary suits for arrears of rent."

But even for judges he adhered to his theory of subordination to a single executive chief, for, he said, "Even as regards judicial officers, I am satisfied that a great advantage is gained by placing them in all matters of an executive nature directly under the Commissioner, just as the Sudder Court in its executive capacity is subordinate to the local Government, and leaving them independent only as regard their judicial decisions."

Lord Dalhousie, who had been responsible for both the Government of India and Government of Bengal, accepted both the argument

and the schemes of Sir Cecil Beadon. He did not, however, make any reservations regarding the separation of the executive and the judicial functions of government. He was mainly concerned with the evil results of the separation as shown by the results. "For the result has been," he wrote, "that there is now in the Lower Provinces one class of officers, the Collectors, of mature standing, highly paid, and with very little work, while there is another class, the Magistrates, inadequately paid, with very heavy work, and without sufficient experience to enable them to do that work in such a manner as fully to command the confidence of the community, however zealous and active they may usually be. These are mischievous in themselves. They are doubly mischievous because they give colour to plausible denunciation of abuses alleged to exist equally in the revenue and judicial management of the East India Company, and lead a distant and ill-informed public in England to receive as startling truths all the outrageous exaggerations they hear or read about "boy-judges and idle Collectors shaking the Pagoda Tree." "The remedy, he concluded, consisted in reuniting the offices of Collector and Magistrate. Such a remedy, he said, seemed "not only simple, but certain."

He was also concerned about the bad system of training provided for officers of the Company

and the frequent changes of officers, both of which had been pointed out by Sir Cecil Beadon. "But when people, not acquainted with the details, are told that a young civil officer after being four or five years an assistant, when he is nothing in particular, is made a Magistrate; that after a few years, quitting the Magistracy for the Revenue Branch, he becomes a Collector; that after a few more years, his next step of promotion takes him from revenue duties and makes him a Judge, that if he be a man of ability, he will probably from a judgeship be moved to the office of Commissioner of Revenue, and that the same ability will in all probability next promote him from a Revenue Commissionership back to the judicial Bench in the Sudder Court—when people hear that a civil officer oscillates through his whole career between executive and judicial duties, and each step he gains is one which does not tend to fit him for the step that follows after; when people hear all this, what wonder can there be if the administrative system is condemned offhand, and that all the evidence given in explanation before Committees of Parliament and then buried deep in folio blue books, wholly fails to move the ill impression that has been produced?"

Lord Dalhousie's note was the occasion of a memorable controversy, the two chief disputants in which were Sir Frederick Halliday and Mr. J.

P. Grant, afterwards Sir John Peter Grant, Sir Frederick's successor as Lieutenant-Governor of Bengal. It has already been noted that Sir Frederick Halliday recanted from his former views. It may also be noted that Mr. Grant, when later in a position of high authority, did not exert himself to carry out his own theories. Sir John Peter Grant's administration was notable for many events. He originated primary education. He was responsible for the Indigo Commission. He settled many questions concerning surrounding Native States. He re-established the system of Honorary Magistrates. He reformed the Police. The Bengal Legislative Council was established in the last year of his "reign." But the separation of judicial and executive was not one of his works. Nor, it may be added, did it characterise the administration of his successor as Lieutenant-Governor, Sir Cecil Beadon.

Sir Frederick Halliday thought that the proposed reunion of offices would be "a great improvement." The complaints of the indigo planters of Bengal had forced Sir Frederick to commit himself to some line of action. The planters had made bitter protests against the existing defective police administration, and the Lieutenant-Governor promised that the offices of Collector and Magistrate should be reunited. The planters had pointedly complained of "boy

magistrates," and had indicated that for the preservation of peace and order more experienced magistrates were necessary. Sir Frederick, in his minute of the 23rd October, 1854, accordingly declared that "The districts in which the change is most urgently required are Nuddea, Jessore, Purneah and Tirhoot." These districts were "full of indigo planters."

Mr. Grant at once fixed on the root fallacy of Sir Frederick's position. Sir Frederick had supported the severance in 1838: now he supported the union. This argued Mr. Grant was a *non sequitur*. In 1838 the police system had been condemned, and the functions of Magistrate and Collector were disunited, on the recommendation of Sir Frederick. Now again the cry of the badness of the police had arisen, and Sir Frederick recommended a return to the old system which he had already condemned. "Are we," asked Mr. Grant, "never to get out of this round? Can it be right for the Government of this great country to spend its time and energy, and the time and energy of its officers, *always* in turning half a dozen into six, and then in turning six back again into half a dozen?"

Mr. Grant objected to making changes if the changes did not remove material faults of principle in what affected the functions of a good administration. Lord Auckland had expressed similar views. He disliked mere

transfers of authority from one person to another as solving fundamental adminstrative questions." "I am deeply impressed with the feeling," he wrote, "that there has been with successive Governments of India too ready a disposition to adopt extensive changes of system in cases only requiring something of administrative reform. Under frequent changes of this kind no system is fairly tried; the confidence of the people is shaken, and they become utterly at a loss to know to what authorities or to what tribunals they are to look with consistent respect. We have a very limited number of trustworthy agents; we have a vast number of important and responsible situations: we must be sometimes disappointed in the efficiency and even the proper conduct of our officers. Yet I would not, upon occasional instances of such disappointment, be hasty to condemn our present means of enforcing a due performance of the public duties, or to look to new classes of agency."

Mr. Grant rightly pointed out that the core of the question was the organisation of the police. Bengal was then much behind the rest of India in its police administration. There was no adequate constabulary or staff of police officials, and, said Mr. Grant, the mere shifting of names and officers among the Civil Servants would not create a constabulary. The reunion was advocated largely to take away the stigma

of "boy magistrates." But if the magistrate's duties were much more important and more difficult than those of the collector's (whose duties were admittedly easy), why not make boys collectors and men magistrates? Much of the difficulty in the re-organisation—as indeed much of the difficulty all along in this question has been—lay in the status and pay of members of the Civil Service. In practically every administrative reform advocated difficulty has been experienced in regard to the training, pay, and prospects of that Service. In these early days of administration these difficulties were aggravated by the lack of differentiation of duties in other directions—police, public works, education, etc.—but as yet there was no question of responsibility to an enlightened Indian opinion. The responsibility of the officials was to their own intellects, or consciences, or public opinion in England, and the questions were debated on files as honestly, and in cases as hotly, as if the participants had been cabinet ministers dependent on the majority vote of a critical House.

Mr Grant's notes in particular have a parliamentary ring about them. One could imagine him arguing his point before a hostile audience. "On the point of principle," he wrote, "I have only to declare that these specialities which, in other parts of India it is by many maintained, justify the seemingly unpropitious union of the

powers of a publican with those of the Magistrate and Judge, do not in any degree exist in Bengal. A Collector in Bengal neither has, nor ought to have influence by reason of his office in his district. If the revenue is paid he must take it, if it is not paid, he must advertise for sale. As the judge in summary suits for rent between zemindars and raiyats, any attempt to acquire influence would be criminal. His miscellaneous duties are of such a nature as would give no man influence anywhere. As guardian of wards and maker of partitions he acts only occasionally and upon individuals. He rarely makes a settlement, and never makes one of any importance. I do not therefore see how by his influence he can benefit the police of his district. On the other hand, I do not think that those general and obvious objections to the union of fiscal, police and judicial powers in the same hands, which are admitted to have weight, and which rule the practice in all the well-governed countries of the west, are inapplicable in any part of India. At this moment, in the Madras Provinces, an enquiry is on foot into the truth of a charge that has been made formally in Parliament, to the effect that in those Provinces, where magisterial and fiscal powers are in the same hands, the government revenue is systematically raised by the use of torture inflicted by the native officers vested with those

double powers. I trust that the charge in the main will be disproved: but I myself heard, when I was in the south of India, some such stories as would naturally have given rise to the charge. I myself heard what makes me very glad that the fact is to undergo enquiry. Now no one can deny that under the Bengal system no such charge could stand a moment. Every one knows that in Bengal Police peons and darogahs often torture prisoners for police purposes; but no one for the last seventy years has ever suspected that a rupee of the revenue was ever raised in Bengal by the help of torture. This is one of the views in which, I submit, the smoothness and silence with which police affairs go on when all power in all departments, is centred in the hands of one train of officials cannot be regarded as for the good of the people, however agreeable they may be to the administrator."

Mr. Grant also searchingly criticised the proposals of Sir Cecil Beadon, which were supported by the Lieutenant-Governor. He approved of that part of the scheme which provided for the separation of judges and revenue Collectors. He did not approve, however, of the proposal to give them equal pay. He held a low opinion of the duties and responsibilities of the Collector and a high opinion of that of the "great office" of judge. Greater pay and position, therefore, he argued, should go to the judge. He particularly

disapproved of placing the judge in any way under the Revenue and Police Commissioner, for, he said, a great part of the business of the judge was to decide cases in which the Commissioner was officially or personally interested. "If a man is to be judge at all," he said, "he must be independent." He objected even more strongly to placing subordinate judges under the Commissioner. The centre of his argument may be expressed in the often-quoted sentence:—"According to my ideas it ought to be our fixed intention to dissever wholly the functions of criminal judge from those of thief catcher and public prosecutor now combined in the office of the Magistrate."

Mr. Grant gave a constructive plan of his own, part of which, however, contradicted his main thesis. He held that the main defect of the system then existing was too great centralisation at district headquarters. The "went of trusty officers in the interior" was the chief defect of the administration. Such officers as there were (the thanadars) were "notoriously bad." He applauded the system of subdivisions which had already been started in some large districts, with Deputy Collectors, Deputy Magistrates, and Excise Superintendents. He recommended a general extension of this system. For criminal justice he favoured the division of districts into munsiffships, which already existed.

The munsiff would receive his cases from the thanadar. Each district was also divided into thanas, and several thanas would form a subdivision. Over every subdivision there would be an assistant or Deputy Magistrate, who would control the thanadars and control the police of the subdivision. They should have no judicial powers. The Sudder Amins, he recommended, should be removed from the sudder or headquarters stations, and sent to the subdivisions and invested with limited civil and criminal judicial powers. At the headquarters would be the Magistrate, with no criminal judicial powers, and the Judge, who would be the head of the criminal and civil judicial system. The Magistrate's duties, he recommended, should be confined solely to the supervision of subdivisional officers, thanadars and subordinate policemen, to discovering crime, and prosecuting in heavy cases. All cases too grave to be tried by munsiffs and the ex-sudder amins would be tried at headquarters by Principal Sudder Amins, Assistant and Joint Magistrates, Deputy Collectors, and Collectors who had time enough, and who had been given power to try such cases.

Mr. Grant's scheme did not wholly dissever the functions of executive and judicial. As he himself said, his system "would not be perfection," but it would be an improvement on the existing system, which, he said, "to speak of it

in moderate language, is not like the system of a country administered by rational beings. The conjunction of functions, he allowed, in part was due to his desire to provide a good scheme of training for young officers of the Civil Service. Each young Civilian would be first an assistant, and trained in the three departments of revenue, minor civil justice and criminal justice. From an assistantship he would pass on to the charge of a subdivision, with increased powers in each of these departments. Then he would become a Joint Magistrate and Deputy Collector, doing both magisterial and revenue duties. The next step would be to a Joint Magistracy (or practically, the chief of police), or a Collectorship. From these posts promotion would be to a Judgeship. Judges would thus be experienced and well trained men, and only the best men would be so promoted. From a Judgeship the promotion would be to a Chief Provincial Judgeship, and, at the top, to a Judgeship of the Sudder Court. The others, Collectors and Magistrates, would be promoted to Commissionerships. But his scheme did not preclude cross-promotion, *i.e.*, from a judgeship to a Commissionership or from a Commissionership to a seat on the Sudder Court Bench.

These criticisms are historically interesting, for it fell later to the lot of Mr. Grant, as Lieutenant-Governor, to remodel the

subdivisional system. Hitherto there had been no fixed principle for the creation of subdivisions. The first subdivision was at Khulna, which then regarded as part of Jessore. Khulna is now a sudder (or as it is now usually spelt *sudar*) station. Originally there was no intention to have a regular system of subdivisions. They were created (as was Khulna) where some powerful local personage resided who abused his powers and required supervision, or in the centre of some very extensive district. Some of the earlier subdivisions had been established around towns or marts, and were retained. Sir John Peter Grant's rearrangement started with the Nadia Division. Krishnagar, the capital of Nadia, then was a divisional headquarters station. He carefully arranged the subdivisional stations according to the size of towns, the accessibility of the place by road, rail, or water, and to general administrative convenience. Thanas were rearranged on similar principles. This rearrangement of subdivisions, (and, as a result, districts) on a definite system was as one of the most important pieces of organisation in the matter of justice in the whole administrative history of Bengal.

To return to the controversy, Sir Frederick Halliday insisted on his views. He did not contend that the reunion of offices would cure all the existing evils of the police, for, he said,

not only were the thana establishments too few for the wants of the country, but, excepting the darogahs, the officers were paid in such a way as "almost to justify corruption." "Where a mohurrir of a thana is paid Rs. 7 per month, a jamadar Rs. 8, and burkundazes Rs. 3-8 and Rs. 4," wrote Sir Frederick, "we may write and talk as we will but no native can believe that we really set out faces against abuse . . . . . . To become a good darogah a man should first serve as a good darogah's deputy. This can only be by entering the service as a mohurrir at Rs. 7 a month, and how is it possible that a man of good education and honest intentions can take such an office, or taking it, fail to make shipwreck of his honesty."

He opposed the objection raised that the reunion was unsound in theory by the "unqualified success" of the measure in practice. It existed in Bombay, Madras, the North West Provinces, the Punjab, and Burma, and even in large tracts of Bengal. It was used in all the newer acquisitions of the empire. The revenue system of Bengal, moreover, he argued, was so simple and mechanical that abuse was impossible, and Sir Frederick was able to quote Mr. Thomasson of the Punjab to the effect that even in a non-settled revenue area abuse did not enter or was negligible.

What Sir Frederick aimed at doing was to

economise power, and to carry out reforms which would not be costly. To concentrate power in the hands of the collector-magistrate would cost nothing. The time of the collectors, too, was not sufficiently occupied, even in the most responsible and heaviest districts. These collectors were senior and experienced men. On the other hand, the magistrates were overworked and were junior men. To give work to collectors and to ease the work of magistrates, and to give magisterial work into more experienced hands, he considered both unobjectionable theory and administratively expedient.

Mr. Grant's reply to Sir Frederick's appeal to experience against theory was pointed. "The new provinces and wilder parts of India had been pressed into service as examples for the administration of the richest parts of Bengal. This is as though the civil administration of Middlesex should be modelled after that of the Isle of Skye." "Surely no one doubts," he retorted, "that poor countries and scanty populations must be governed in a manner conformable to their requirements and to their means of paying for government; and that semi-barbarous people do not require the same pensive and refined system of administration as highly civilised people. And surely there is one method for people beginning to be broken into civilised government, and another method for people

who have been under our laws for several generations." "Besides," he continued with a home thrust, "it was inconsistent to stop there," for he asked, "why does not the Lieutenant-Governor carry out his theory and recommend the Calcutta police magistrates to be appointed collectors of abkaree and house tax?"

His reply to the plea of economy was that it could not but be wasteful in the highest degree that such a rich province as Bengal should have such a bad system of police and criminal judicial administration, an argument which, granted the badness he ascribed to the Bengal system, was irrefutable.

The opinions of Mr. Grant were supported by his fellow members of Council, Sir Barnes Peacock and General Low. General Low thought that the duties of a magistrate in Bengal could be performed by a European officer who was also collector, provided he had a sufficiently able staff under him, but, if the Government could afford it, he preferred, as a "more permanently effective measure" to keep the duties of magistrate and collector apart. Sir Frederick Halliday, however, stuck to his guns. He reiterated the previously stated reason, namely, the necessity of experience, as against the inexperience of "boy" magistrates. In his long note of reply he protested against the withdrawal of judicial powers from magistrates on

two grounds—the ground of prestige and that of self-respect in the magistrate.

"I believe too," he wrote, "that to deprive our magistrates of judicial power, while it would degrade them in the eyes of the native community, who can never understand why, when the *Hakim* has caught a thief, he should not forthwith try and punish him, would take away a great cause of self-respect from the executive functionary and a great means of self-improvement I have no doubt that the sense of judicial responsibility has a very large and important effect in raising the character and improving the conscientiousness, of our executive magistrates, while it certainly adds greatly to their influence among the people, and I am satisfied that justice is not likely to be less truly or satisfactorily administered under the present system, which entrusts large judicial powers to Magistrates and Deputy Magistrates than under a system which taking away from them all judicial power, would make them in their own view and in the apprehension of the people among whom they act, nothing but a higher kind of police darogah."

The personal element, the element arising from the universal failings of human character would, according to Sir Frederick, make the scheme difficult. At the risk of prolixity, I must give Sir Frederick's picture of a possible mofussal administration under a system of separation.

He spoke doubtless from personal experience, and his experience will appeal to many district officials of to-day.

Sir Frederick commented on the functions performed by the circuit judge up to 1830. Before 1830 the more serious cases in the district were tried by the circuit judge, who came to the station at various intervals and tried such cases as he found ready to be tried. Then he departed to another station to be succeeded on the next circuit by a different judge, and after another interval by another judge; and so on. This circuit system was succeeded by the system whereby one permanent sessions judge was appointed for each district. Sir Frederick, however, did not regard either the circuit system or the permanent sessions judge system as satisfactory. The circuit judge was little known and therefore more honoured. The permanent judge had to live in a small station and in a confined society and of necessity had incessant intercourse with magistrates, thus breeding a familiarity which resulted in lack of respect. "Small soeieties, too," he wrote, "are liable to jealousies, scandals, quarrels, over-friendships and over-enmities, and in all these to the detriment of his official usefulness and his judicial dignity the judge is not seldom found to bear a part. Sometimes the Judge and the Magistrate are in open enmity, and then every counter-decision

is apt to be attributed by the keen-sighted native observers, to the existence of ill-feeling between the two functionaries. As often, perhaps, the Judge and the Magistrate are in close intimacy. They dine together, they ride together, they shoot or hunt together; their tastes and feelings are obviously in union and then every judicial affirmation of commitments and appeals is liable by narrow-minded and interested by-standers, to be put to the account of friendship and influence. In one zilla the judge perhaps is weak, and exercises feebly and ineffectually the control over the magistrate which the system expects of him. In another zilla the judge may be vigorous, encroaching, overbearing and then the magistrate is made a cypher, and his power without his responsibility passes into hands for which it was never intended."

Sir Frederick considered that there was much evil and as much good in the existing system of administration in the mofussal. Many of these evils undoubtedly arose, he said, from the antagonism of a locally opposed judicial and executive authority. But if, he said, such antagonism were the case with two "liberally educated Englishmen," in one district, conceive what it may be between the Bengalis themselves all over the province. "Conceive," he wrote, "every darogah opposed, perhaps, to an

antagonist local munsif and every native Deputy Magistrate to a native Sudder Ameen at an out-station; imagine the bickerings, the criminations and recriminations that would ensue. For though under the greatest provocation, corruption is the last thing which a native ever imputes to an English Judge or Magistrate, it is the first imputation which a native casts on a native on great provocation, on slight provocation, or on no provocation at all."

Thus the executive officers would account for their failures by insinuations against the judicial, and *vice versâ*. All the difficulties and embarrassments would be multiplied a hundred-fold under the system of separation. "If it were asked why crime has increased in a given district, the executive officers would reply: "Because of the pertinaciously unreasonable acquittal of all our criminals by the judicial functionaries." If the judicial functionaries were in any way questioned for this result, they would answer. "It is because of the negligence and inefficiency of the executive." Thus, Sir Frederick said, nobody would be responsible. Power would be divided everywhere and everywhere power would be contending against power. The mofussal administration would be torn asunder and confusion would be more confounded. And, he added, no one would say his picture of mofussal administration was overdrawn.

Sir Frederick Halliday's minute was followed by a minute of the Governor General, Lord Canning, in which he approved of the reunion of functions. Lord Canning devoted much space in his minute to the question of the re-organisation of police, which, he said, should be done by Provinces, and not on a general scheme for the whole of India, a scheme which had been favoured by the Court of Directors. Lord Canning's minute was written in 1857, the year of the Mutiny, and his proposals were not carried into effect. The matter was taken up by the Police Commission of 1860. Lord Canning approved of the reunion of magisterial duties with those of the Collector on the general grounds laid down by Sir Frederick Halliday. He agreed with Mr. Grant in his view that what may suit a people at one stage of civilisation may not be suitable for them, or another people, at a different stage. This general argument Lord Canning dismissed by roundly declaring that so far as he could understand Bengal was not very different from the rest of India. The administration of the penal system in Bengal required "all the force and influence which the Government can bear upon it," and the best way for bringing this force to bear on it was to concentrate authority. Lord Canning agreed to the proviso made by the Court of Directors, that the concentration should be in the

hands of European officers only, as they did not abuse their power. He also considered that the Joint Magistrate should be charged with the immediate responsibility of controlling the police, after the manner of the District Superintendent of Police in the Bombay Presidency, and the present District Superintendent of Police in Bengal. He also recommended that Deputy Magistrates should have judicial as well as police powers.

Lord Canning's views were accepted by Mr. Dorin and General Low, but Mr. Grant and Mr. Peacock adhered to their previous theory. Mr. Grant's hands had been strengthened by a dispatch from the Directors and the publication of the Madras Torture Commission's Report. The Directors, as we have seen, had definitely ruled that the joint powers should only be held by European officers, so that as far as Indian officials were concerned, Mr. Grant had carried his point. The decision of the Court of Directors was based on the findings of the Madras Torture Commission and the subsequent debate thereon in April 1856, in the House of Lords, as well as on the normal reports from the Governor General.

In their Despatch (No. 41 Judicial, of September 1856), the Court of Directors urged the Government of India to undertake at once a thorough reorganisation of the police. Bearing

on the question of separation, the Despatch said:

"*To remedy the evils of the existing system the first step to be taken is, wherever the union at present exists, to separate the administration of the police from the land revenue.* No native officer should be trusted with double functions in this respect. We do not see the same objection to the combination of magisterial and fiscal function in the hands of European officers, because we can better hope they will not abuse their powers, and, because by employing the collector as the principal magistrate of each district, we are able to obtain for the chief administration of the penal laws a more efficient and especially, a more experienced class of officers than would otherwise be available. This is an important consideration which might never be lost sight of: nevertheless, it is still more important that the officers who control the police should be required to undertake frequent tours of their districts, and they must not be so burdened with other duties such as the preparation of forms, returns and statements, as to be deprived of the time sufficient for this essential purpose. The supervision, exercised by intelligent officers, who are accessible at all times, is the most certain and effectual check to every abuse of authority by subordinate servants of police.

"*In the second place, the management of the police of each district should be taken out of the hands of the Magistrate* who would thus have more time for the exercise of the double functions adverted to in the foregoing paragraph, and be committed to a European officer with no other duties and responsible to the general Superintendent of Police for the whole Presidency."

I quote these paragraphs *in extenso*, because the lines in italics were quoted separately in the well known memorial submitted by Lord Hobhouse to the Secretary of State for India in 1899. The quotation of these sentences, separated from the context, was misleading. Unfortunately the question of separation became a polemical weapon of politicians in later years. Passing from the cooler atmosphere of administrative science, which is its true medium, it became a "hardy annual" at the National Congress, and, unfortunately for those who supported separation, it took to itself the usual weapons of party politics—*suggestio falsi* and *suppressio veri*. Lord Hobhouse's memorial, the moving spirit behind which was Mr. Monmohan Ghose, lost the weight that the names of the signatories gave to it, by failing in the quality which might most have been expected of such signatories, *viz.*, judicial fairness. The memorial was calculated in part at least to discredit the *English* administration of India, and, because of its unfairness in this respect, it came

up against the solid phalanx of the Indian Civil Service. The officials of that Service would doubtless have been less uncompromising in their attitude had the real facts of the case been presented on both sides. No one, not even Mr. Monmohan Ghose, was a stouter defender of the principle of separation than Sir John Peter Grant, a member of the Service, and Sir John was an administrator, not a High Court Judge as most other supporters of separation were. But Mr. Grant was rigidly fair in his presentation of the case and in his arguments. Strong as was his support of the theory, it was fortunate for the Hobhouse memorialists that their memorial had not to face the scathing sarcasm which his judicial pen would have poured upon it.

It may also be noted that the land revenue system was arraigned in this despatch. The onus of the argument now changed to criminal justice and police powers.

The misleading quotations from the foregoing despatch much damaged the Hobhouse memorial; but what damaged it still more was its failure to take into account the Report of the Madras Torture Commission of 1855. From the impartial point of view of administrative science, an analysis of this Report alone would have helped their case. But instead of doing so, the memorialists preferred to forward the records of cases collected by Mr. Monmohan Ghosh, in each of

which the District Magistrate was concerned. The real strength of their position was not the delinquencies of a few Civil Service officials, but the essential administrative soundness of the theory of separation. The personnel of the magistracy did not matter, and because of their desire to shield the mal-administration *by Indians* the memorial failed to present a good case. From a perusal of the papers regarding that memorial, I judge that the memorial might have had much more effect had it been strictly an administrative document. As it was, it too obviously was political.

The Report of the Torture Commission was published in April, 1855. The Commissioners reported that in the case of the Madras Collectorate, the main reason for the absence of torture was that the revenue and police establishments were separate. In the mofussal of the Madras Presidency, however, the Collector-Magistrate was head of police, and the revenue officers were afraid of the police. The Commission received many complaints from individuals who had never complained to the local authorities, on the ground that such complaints were useless. As the Commission pointed out, these individuals were afraid of the "banded body of *amla*" belonging to the department with which they were concerned, for they thought that all *amlas* under one head, whatever their names, were one band,

The general mental effect on the Indian, Mr. Grant said, was that the combination of functions made him look on complaints as useless. The hand of all the departments under the one head, he thought, was against him, and complaint might bring more evil than it would suppress.

"I freely admit," wrote Mr. Grant, "that so far as the officers' own acts and omissions are concerned, the evil of the combination in the hands of a high European officer is very much less in degree than when in the hands of a Native. But my argument is that the main part of the evil is not in the effect of the combination upon European officers' own acts, but in its indirect effect upon both the classes of Native officers under him, and upon the minds of the natives of his district. Yet even so far as the European officers' own acts and omissions are concerned, I cannot admit that the evil is so small in degree as to be otherwise than material. I wish I could make this admission, but I cannot do so with truth. I cannot rise from a perusal of the Torture Report, without feeling that there has been a degree of blindness, slowness, dullness and inaction in the Madras Collector-Magistrates in relation to the practice of realising revenue by torture, which certainly so many active and intelligent men would not have shown if the torturers had been private persons, and the object had been something in which those

Collector-Magistrates had no official interest. I say this with sorrow, and I make allowance for the false position in which these officers are placed. But taking the view I do of the fact, I should be unpardonable if I did not do all in my power to relieve them from this false position, and to oppose with all my strength the extension of the system which in their case had such lamentable consequences."

These words one might have expected to see in the polemical pamphlets on the question : still more might one have expected the following instance, quoted from Mr. Grant's own experience : "A remarkable example of the effect of this unnatural union of functions" was disclosed in the Legislative Council, in connexion with a matter which was under his own charge. He had introduced a Bill to get rid in the Bengal Presidency of the system of the unnecessary impressment of carriages for troops marching. An order had been passed preventing similar impressment in Madras by Sir Thomas Munro; nevertheless impressment was carried on as before, but now contrary to the law. Sir Thomas however, died before the order was put into effect and adequate commissariat arrangements made. The result, in Mr. Grant's words, was that the Collector-Magistrates, by reason of their double power, were practically above the law. The Collector could break the law by seizing the

transport, and it was the same man, in his magisterial phase, whose duty it was to release the transport, restore it to its owner and punish the offender for unlawful seizure. "But," says Mr. Grant, "none but the offender has the power of dealing with the offence." Still another element in such a union of functions was the privilege not only of inflicting punishment, but of exempting individuals from punishment.

The Torture Commission Report, however, did not condemn individuals. It condemned a system, and it was no argument to say that though the "Native" system was bad, it would prove good if worked by Europeans. Mr. Grant's remarks on what was called the "Native system" are very much to the point—

"The Torture Commissioners are in nothing more confident than in this that, bad as the system has been worked under us, it was infinitely worse as worked under Native rule. The Native system then was an abomination, as is now universally recognised, when worked in the only way its inventors contemplated its working: and, but for the miracle of the country having fallen under the dominion of strangers from a distant western Island, it must now be admitted that the theory of the propriety of this union of dissimilar functions, as an Indian practical question. would have become hopeless.

Therefore, the contention of all supporters of this union.... must now be narrowed to this position: that the Muhammadan system, though abominable under the Muhammadans, became by a wonderful accident, the best possible system for the country they misgoverned, when put into the hands of Englishmen, though confessedly it is a system which is contrary to all English principle and practice, and is disagreeable to the commonplace Indian mind."

Mr. Grant's contentions were perfectly reasonable. Nothing could be more calculated to condemn the system of government than making such invidious distinctions between "Native Officers,' as Indian Officials were then invariably designated, and Englishmen. Obviously something was wrong in a system of this kind, and, indeed, the recommendations of the Court and of Lord Canning were not put into effect. Deputy Magistrates and Deputy Collectors had the same powers in kind, though not in degree, as the covenanted Magistrates and Collectors. To have granted to the one class what was withheld from the other would not only have created ill feeling, but would have been administratively disastrous. On no logic whatever, not even the logic of racial distinction, could the theory of Lord Canning be upheld, save as a temporary expedient. Obviously where such a gauche *pis aller* had to be resorted to,

there was something wrong in the scheme of administration. Either Englishmen and "Native Officers" had to have the same powers and duties, even with the rejoined functions, or some more administratively logical scheme had to be evolved. As it resulted, the former course was adopted. But the majority of the rulers of India of these days did not foresee the growth in numbers and efficiency of the purely Indian services of government.

A debate took place in the House of Lords on the subject in April, 1856. One of the principal speakers was Lord Ellenborough, who had succeeded Lord Auckland as Governor-General of India. Lord Ellenborough was a strong believer in the separation of revenue and fiscal functions, "the only subject on which I and my Council did not agree." Mr. Grant endeavoured to use this debate to stay the hand of the Government of India, but he was unsuccessful. He pleaded with that government to make no decision till the decision of the Madras Government on the findings of the Torture Commission had been made. His final appeal for Bengal—in words which are rarely read and never quoted was—

"The natives have been torturing each other for three thousand years, just as they have been poisoning each other for the same period. When we are blamed because of the existence of these

criminal habits, we are blamed foolishly and unjustly. We cannot justly be blamed, in a moral point of view, if we use every means in our power to bring these crimes to light, and to punish them when they occur. And we cannot justly be blamed, in a political point of view, if we take all becoming pains to show the world that we are sincere in our abhorrence of these crimes, and in our endeavours to check them. In my view of the requirements of police and criminal justice (and I view these matters as the mass views them, having no Indian or other theories to gratify), we do not justly escape blame either in a moral or in a political point of view, so long as we confound police and criminal justice with the fiscal department of administration, subordinating, at least to all outward appearance the former to the latter.

"But if the Bengal Revenue system is still thought a material distinction in favour of the union in Bengal as a speciality I would ask if Bengal has no specialities to be weighed in the opposite scale, in its thick population, its great general wealth, its high value of land, its large number of native nobility and gentry, each possessing immense wealth and power, its large number of European residents, planters and traders, arrived at a stage of progress which, if it has not all the moral, has all the immoral qualities of the highest state of civilisation?

Beyond question, the union will be distasteful to all these important interests, the existence of which in great strength forms the distinctive feature of Bengal.

"The system whereby various functions, each of which is separate in other well administered countries, are sometimes united in India is represented in its most amiable view where it is called patriarchal. It is suitable and convenient as a temporary expedient in a new acquisition: and it is a necessary expedient in a poor and ill peopled Province of great geographical extent. It is a very silent system, and goes on with little trouble to rulers, so long as the remembrance of the ancient misrule lasts, and so long as few Europeans, or others who have been accustomed to a regular government, fall under its operation. It is a great favourite with those whose administration is known to the public only by their own reports of it. But it has its long undiscovered abuses and its sudden explosions—witness the Madras Torture Commission. Without, however, questioning the system, where it is appropriate, I ask if such a country as I have above described Bengal to be is a fit country for a patriarchal experiment? For this system two parties are required, the sage and paternal ruler of a district, and the dutiful family of subjects. Not to speak of the first requisite, I may safely deny that Bengal affords the last. One has only to

read a Native or English newspaper, with a mufussal circulation, to see that those for whom such mental good is provided have no filial regard for government officers. They are passed the patriarchal epoch. What they ask for are good laws, well administered by as many functionaries as the country can fairly claim with reference to its general circumstances, and the taxes it pays. These classes want nothing from government more paternal than this; less than this they will not accept; and all this they have right to have. My mature conviction is that they never can have this, unless incongruous functions are kept in separate hands, and every functionary is required to mind his own proper business."

The controversy ended by the recommendation of the Governor-General in Council (Messrs. Grant and Peacock signing the letter) that the police should be reorganised on a basis of territorial commissionerships of police, and that a corps of military police should be attached to each division. The various minutes and notes on the reunion of executive and judicial officers were submitted for the orders of the Home authorities.

The despatch of the new functionary who succeeded the Court of Directors after the Mutiny, the Secretary of State for India—then Lord Stanley—accepted the recommendations of Lord

Canning, but he was at pains to meet the arguments of Messrs Grant and Peacock. The Madras example, he declared, was not applicable to Bengal, because of the Permanent Settlement. The other arguments he met by the usual counter arguments—the proved success of the system in other Provinces and the necessity for strong administration of the penal laws.

The orders of the Secretary of State were quickly carried out in all the districts where separation had taken place. The district officials were told that the reason of the change was to place the administration of the penal laws in more experienced hands. The Collector-Magistrates were informed that as judges they were to try only serious cases, and that they had to supervise the police, and to their other miscellaneous duties. The police was now to be under Joint Magistrates and Deputy Collectors, acting under the Collector. The Collector was informed that these functionaries were not to be placed in the embarrassing and anomalous position of sitting in judgment in cases for which he himself had prepared the evidence.

The question of the reorganisation of the police, which had occupied so much of the attention of both Sir Frederick Halliday and Lord Canning, was taken up after the suppression of the Mutiny. A Police Commission was formed, representative of the whole of India. The terms

of reference of the Commission were fairly detailed. They were instructed to devise a scheme which would ensure that the police organisation was centralised in the hands of the executive government On the subject of the separation of functions, the following instructions issued to the Commission are interesting—

"The functions of a police are either protective and repressive or detective, to prevent crime and disorder, or to find out criminals and disturbers of the peace. These functions are in no respect judicial. This rule requires a complete severence of the police from the judicial authorities, whether those of higher grade or the inferior magistracy in their judicial capacity. When, as is often the case in India, various functions are combined in the hands of one magistrate, it may sometimes be difficult to observe this restriction; but the rule should be kept in sight that the official who collects and traces out the links in the chain of evidence in any case of importance should never be the same as the judicial officer, whether of higher or inferior grade, who is to sit in judgment on the case." The instructions said that it might sometimes be difficult to insist on this rule but that experience showed that the difficulty was not so great as was usually supposed and, they concluded, the advantages of insisting on it "cannot be over-stated."

Another section of the instructions said: "The working police having its own officers exclusively engaged to their own duties in preventing or detecting crime, the question is, at what link in the chain of subordination between the highest and lowest officers in the executive administration, is the police to be attached and so made responsible as well as subordinate to all above that link in the chain? The great object being to keep the judicial and police functions quite distinct, the most perfect organisation is, no doubt, when the police is subordinated to none but that officer in the executive government who is absolved from all judicial duty, or at least from all duty involving original jurisdiction, so that his judicial decisions can never be biassed by his duties as Superintendent of Police......It should be so arranged that an officer should never be liable to try judicially important cases got up under his own directions as a police officer.

"This raises the question—Who is to be responsible for the peace of the district? Clearly that officer, whoever he may be, to whom the police are immediately responsible. Under him it is the duty of every police officer and of every magisterial officer, of whatever grade, in their several charges, to keep him informed of all matters affecting the public peace and the prevention and detection of crime. It is his duty

to see that both classes of officers work together for this end; as both are subordinate to him he ought to be able to censure their combined action. The exact limits of the several duties of the two classes of officers it may be difficult to define in any general rule; but they will not be difficult to fix in practice if the leading principles are authoritatively laid down, and, above all, if the golden rule be borne in mind that the judicial and police functions are not to be mixed up or confounded, that the active work of preventing or detecting crime is to rest entirely with the police, and not be interfered with by those who are to sit in judgment on the criminal."

The Report of the Commission, submitted in September, 1860, contained pertinent recommendations regarding the separation of functions. The main recommendations were these:—

"That in every district under the jurisdiction of one magistrate there should be at least one European officer of police, to be styled District Superintendent of Police, who should be departmentally subordinate to the Inspector-General of Police in every matter relating to the interior economy and good management of the force, and efficient performance of every police duty, but bound also to obey the orders of the District Officer in all matters relating to the prevention and detection of crime, the preservation of the

peace and other executive police duties, and responsible to him likewise for the efficiency with which the force performs its duty.

"That on him should devolve the command and control of all the establishments of police of every denomination within the district, and, under the general administrative and judicial control of the District Officer, also the maintenance of the public peace and the prevention and detection of crime.

"That as a rule there should be complete severance of executive and police from judicial authorities; that the official who collects and traces out the links of evidence, in other words, virtually prosecutes the offender, should never be the same as the officer, whether of high or inferior grade, who is to sit in judgment on the case, even with a view to committal for trial before a higher tribunal. As the detection and prosecution of criminals properly devolve on the police, no police officer should be permitted to have any judicial function.

"That the same true principle, that the judge and detective officer should not be one and the same, applies to officials having by law judicial functions, and should as far as possible be carefully observed in practice. But with the constitution of the official agency now existing in India, an exception must be made in favour of the District Officer. The Magistrates have long

been, in the eye of the law, executive officers having a general supervising authority, in the matters of police, originally without extensive judicial powers. In some parts of India this original function of the Magistrates has not been widely departed from, in other parts extensive judicial powers have superadded to their original and proper function. This circumstance has imported difficulties in regard to maintaining the leading principle enunciated above, for it is impracticable to relieve the Magistrates of their judicial duties; and on the other hand it is at present inexpedient to deprive the police and the public of the valuable aid and supervision of the District Officer in the general management of police matters.

"That, therefore, it is necessary that the District Officer shall be recognised as the principal controlling officer in the police administration of his district and that the civil constabulary, under its own officers, shall be responsible to him, and under his orders for the executive police administration.

"That this departure from principle will be less objectionable in practice when the executive police is kept departmentally distinct and subordinate to its own officers, and constitutes a special agency having no judicial function. As the organisation becomes perfected and the force effective for the performance of its detective

duties, any necessity for the Magistrate to take personal action in any case judicially before him ought to cease.

"That the District Officer is the lowest grade in whom judicial and police functions should be united, and that therefore officers below that grade who exercise double functions should be relieved of one of the functions."

The proposals of the Police Commission were accepted by the Government. In September, 1860—it will be noted that the executive government of these days did not delay in introducing measures—a bill was introduced by Sir Bartle Frere to improve the police in India. In the debates on this bill the question of separation of the judicial and executive was fully threshed out and the debates show that the continued union of judicial and police functions in the District Officer was regarded as a temporary measure.

Sir Bartle Frere definitely regarded these measures as transitional. The Report of the Proceedings says, "His hon'ble friend (Mr. A. Sconce, who represented Bengal) went on to say that though the separation of judicial and police functions was a principle of the bill, and one of which he (Mr. Sconce) approved, it was not the aim of the Commission.. ...In reply to this charge he would remind his hon'ble friend that it was one thing to lay down a principle and

another to act on it at once and entirely when it was opposed to the existing system, to all existing forms and procedure, and to prejudices of long standing. Under such circumstances it was often necessary to come to a compromise... The hon'ble member had called the Bill a half and half measure. He could assure the hon'ble gentleman that nobody was more inclined that it should be made a whole measure than he was, and he should be very glad if his hon'ble friend would only induce the executive governments to give it their support so as to effect a still more complete severance of the police and judicial functions than the Bill contemplated."

This bill ultimately became Act V of 1861. On this Act the combination of powers at present vested in District Magistrates rests, so that the hopes of Sir Bartle Frere, notwithstanding the periodical revisions of the Code of Criminal Procedure, have not yet been realised, at least in theory.

The Act of 1861 settled the question of separation of functions for Bengal. In other provinces similar Acts were passed. Subordinate officers of government no longer exercised the double functions, but superior officers continued to control the police. The actual executive control of the police passed to the Superintendent of Police, but his work in the detection and prevention of crime was supervised by the

district Magistrate, who also tried criminal cases. The experience of all the ablest and most experienced administrators in India urged this qualification. For the preservation of peace and order the magistrate continued to exercise double functions. Such exercise was reckoned to confirm his position and prestige in the eyes of the people.

The next pronouncement of importance came from the pen of Mr. (later Sir James) Fitzjames Stephen, the Legal Member of the Viceroy's Council. In the meantime the First Indian Penal Code had been passed, in 1860 ; and in 1861, the first Code of Criminal Procedure was passed. Both Acts were soon amended—the Indian Penal Code in 1864, and the Code of Criminal Procedure in 1862, 1866 and 1869. In 1870 the Law Commissioners presented their report, on which the new Code of Criminal Procedure (Act X of 1872) was based. This Code was the occasion of a note by Mr. Fitzjames Stephen on the Administration of Justice in British India.

The actual judicial administration of the period when Mr. Fitzjames Stephen was Legal Member was, on a contracted form, very much the same as it is now. In the Regulation Provinces the highest judicial functionaries (High Court Judges, Civil and Sessions and Additional Judges) exercised purely judicial functions, both civil and criminal. Subordinate judges, judges

of Small Cause Courts and munsiffs were also employed purely on judicial work. Magistrate-Collectors, Joint Magistrates, Assistant Magistrates, and Deputy Magistrates exercised both executive and judicial functions, the judicial function appertaining only to criminal justice.

This division which held for Bengal, was, with a few changes in nomenclature or additions of officials, true of all the Regulation Provinces. In Bombay there was a more advanced organisation which later in principle was copied throughout India. A division was made in the Civil Service between judicial and executive work. The young Civilian started his career as an Assistant Magistrate and Collector, but after five years' service had to choose either the revenue or judicial side, and, once he made his choice, he had to stick to the line chosen. If he chose the judicial side, he started as an assistant judge. The assistant judgeships were divided into three grades and led to a full judgeship, which was attained after seven or eight years in the junior grades.

The question of separation in the Non-Regulation Provinces did not arise, as the union of functions was complete from the bottom to the top, except for judges of the Chief Courts and judges of Small Cause Courts.

The part of Mr. Fitzjames Stephen's note that deals specifically with the separation of

the executive and judicial is one of the best analytical notes ever written on the subject. He pointed out that the popular interpretation of the underlying principles of government in the Regulation and Non-Regulation Provinces was wrong. In the Regulation Provinces the government was supposed to be by law; in the Non-Regulation Provinces government was supposed to be personal and arbitrary. In settled areas government by fixed rule or definite law was possible: whereas in unsettled or wild areas the administration had to be left to the personal discretion of the rulers. In the former, the government could be organised in a scientific way: in the latter all functions had to be concentrated in individual officers, who had to have powers to meet exigencies as they arose. But the difference was not between government with law and government without law. In the more primitive or wilder districts recognised rules or laws were as essential as in advanced districts. The difference was between one kind of law and legal administration and another. The so-called personal government of Lord Lawrence in the Punjab was a case in point. It was not government without law: indeed the first thing Lord Lawrence did was to draw up Civil and Criminal Codes and Rules of Administration of Civil and Criminal Justice. True, much latitude was given to personal discretion;

but the actual administration was not arbitrary.

"To unite *by law* all authority in one hand," wrote Mr. Fitzjames Stephen, "to give *by law* wide individual discretion to the person in which hands all authority is so united, to make the laws so administered, as few, as plain, and as simple as possible, are no doubt good principles for the administration of a wild province; but all this is government by good law as opposed to government without law on the one side, and government by bad law on the other, unless, indeed, it is asserted that laws are scientific in proportion to their intricacy and technicality, and not in proportion to their brevity and simplicity."

Mr. Fitzjames Stephen proceeded to lay down the following principles regarding the union of powers. "It is desirable to do so," he said, "so long as nothing is attempted which a single officer cannot do; but when that point is reached, the so-called Non-Regulation system becomes, if persisted in, less, instead of being more, efficient than the Regulation system, and in particular, the executive functions of the officers are sacrificed to their judicial functions."

He proceeded to point out that officials in Non-Regulation provinces tended to neglect their more important executive duties for judicial duties. His remarks are important, as it

frequently has been asserted by controversialists that the union of powers is objectionable because the judicial work is neglected. In a careful analysis of the opinions expressed by leading Punjab officials, and of court returns, Mr. Stephen concluded that the Non-Regulation system of the Punjab was no longer advisable. Practically all the leading officials, while tenaciously holding on to the personal rule system, confessed that work was multiplying so fast that an officer had to neglect either his judicial or executive functions. To solve this difficulty most of them preferred a multiplication of Officers to a change of system. They argued that the official could not know the people through the courts only. He had to tour in the villages, mix freely with the people, take an interest in their life and problems. Indeed, only by so doing would he be a good judge. Even if functions were separated, judges should first have considerable administrative experience. The Lieutenant-Governor, Sir Donald Macleod, put the matter another way. The exercise of judicial functions, he said, was an important means for obtaining an intimate knowledge of the habits, feelings, customs and transactions of the people which was essential for administrative excellence. He also said that high judicial training was not essential, because the number of cases involving recondite principles of law

were few, and the law itself was daily being simplified by the publication of well digested Codes.

The Punjab, when Mr. Stephen wrote, was in a transition stage. The officials were loath to give up the older and more pleasant system of personal rule; but the multiplying work and problems demanded a change. The functions and the work of the executive official and the judge were becoming incompatible. In the older days, the touring official dispensed justice as he toured, but with the growing bulk and complications of the Codes of Procedure, judicial work had to be more considered, and, as a result, stationary. The Chief Court had now to be reckoned with; it insisted on formally correct procedure and judgments. Judicial work, therefore, required more time and care, so that in many cases executive work, which was not so strictly supervised, was neglected. The Punjab system, in short, has quickly outlived its purpose and utility.

His conclusion was that the Punjab system should be abolished throughout India. While admitting that there might be cases where a 'single ruler' might be advisable, *e. g.*, in primitive areas, and areas where duplication of functionaries would be wasteful, Mr. Stephen said—"I think that as a general rule, the complete amalgamation through every grade of the service

of judicial and executive functions, is inconsistent with the proper administration of a regular system of law, and especially of the Code of Civil and Criminal Procedure."

Mr. Stephen proceeded to examine the question of dividing the Civil Service into an Executive and a Judicial Branch. In 1864 and 1865 the High Court of Calcutta complained that the chief magistrates of districts did very little criminal work. The High Court pointed out that this meant a lack of training and a loss of knowledge in the type of work to which these officers were promoted—the work of the Sessions Bench. In reply to these objections, the magistrates practically unanimously declared that they could not perform their criminal magisterial duties well because of their executive work. They also said the remedy was to separate the judicial and executive branches of the service. One of the most interesting developments reported by the Bengal officials was the growth of a Bar which threatened to overshadow the Bench. Several Bengal officials remarked on the contrast of the Bengali pleaders and judges "who had received a regular legal education at the Calcutta University," and the unsatisfactory training of the Civilian judges. One Bengal official declared that the judicial branch of the Civil Service required strengthening, because, "unless a judge has devoted some

time to legal studies, he is not capable of holding his ground against the advocates that surround him." This, he very rightly said, "was a serious and not very creditable state of things." Another commented on the "spectacle of a Mofussal Bar in advance of the Bench in experience of the requirements of the law, and a practical knowledge and understanding of the application of its principles."

In the evolution of the Indian magistracy it is interesting to note the first effects of university education on the old service system. Hitherto, the arguments for union had largely turned in the lack of a local supply of trustworthy officials. From now onwards another element entered—the university graduate, educated on western lines. The existence of this element, and the large part it was destined to play in administration, both within and without the services, completely cut the ground from under some of the old stronghold arguments; and, in the course of time led to a practical, if not yet a theoretical separation of functions.

The evidence from Madras was very much the same as that of Bengal. The difficulty of officers carrying out efficiently both their executive and judicial duties, the lack of a proper system of training for judges, and the contrast between ill-equipped Civilian judges and a well equipped bar—were common. In the

Non-Regulation Provinces the evidence showed the necessity of a judicial service, but not of a complete separation of functions; such a separation was reckoned to diminish the personal influence of officials. The Bombay system was most satisfactory.

Mr. Stephen's review of evidence from all India led him to the following conclusion. "It seems to me that the first principle which must be borne in mind is that the maintenance of the position of the district officers is absolutely essential to the maintenance of British rule in India, and that any diminution in their influence and authority over the natives would be dearly purchased even by an improvement in the administration of justice. Within their own limits, and as regards the population of their own district, the district officers are the Government, and they ought, I think, to continue to be so."

These remarks have been often quoted, or misquoted, by controversialists, who have not considered fully the circumstances under which these pronouncements were made. Theoretically Mr. Stephen completely favoured separation, and had he been free to carry out his theories, he would have enforced separation. Mr. P. C. Mitter, in his useful monograph on *The Executive and Judicial*, says many hard things of Mr. Stephen as a reactionary and as responsible for

many reactionary legislative measures. The spirit of Mr. Stephen's work and the result are two quite different things. It must be remembered that although Mr. Stephen was not a service official, he was Legal Member, and, as such, had to form opinions on administrative subjects on the evidence supplied by the provincial governments of India. He was an official, dealing with officials, and, to a large extent, fettered by official opinions. His note is valuable historically for its reflexion of the official mind as well as for its administrative and legal acumen. He himself summarises the conditions under which, in his opinion, justice would continue to be administered in India, and it must be remembered he had before him the opinions of the leading administrators and judges of the whole of India. The central maxim of his theories is the maintenance of British rule in India, a not unnatural maxim considering the recent historical circumstances. On this basis, he gave the following four conditions, which were the result of a *survey of evidence from all India, not his own personal views*.

1. "The system of justice, as long as it lasts, must be a system administered by foreigners cast in a mould singularly different from that in which their subjects are cast.

2. That justice must always be administered

in a foreign language, and by men who have to learn, by long observation and experience, those elementary facts about the habits and feelings of the people which Native Judges would have learned from infancy by all the common intercourse of life. . .

3. Justice must, for a great length of time, be administered without the two great popular checks, to which we are so much accustomed in England, of the Bar and the press.

4. Till some change in the national character takes place, justice must be administered among people to whom every form of falsehood is familiar and who appear (as I am informed) to regard falsehood in a European Court as absolutely no crime or sin at all. In other words, the judges, must in most cases, guess at the truth."

The spirit of this may be compared with our latest official pronouncements, as summed up in the Montagu-Chelmsford Report, the main purport of which is that British rule, in the sense understood in the fifties of last century, will *not* continue in India.

After the full and careful survey of opinions, Mr. Stephen concluded that the conditions under which justice was administered in India at his time were such that it was idle to hope that the system would reach the high standard of the English system. The main problem,

therefore, in the administration of justice was more how to endure or palliate inevitable evils than to eradicate them. He therefore recommended the separation of functions as far as possible. Total separation was impossible, and the best division of labour was between civil judicial work and criminal judicial, with executive work. Criminal judicial functions should be kept in the hands of district officers.

Mr. Stephen also condemned the existing organisation of the High Courts, and the administration of civil justice generally, but we are not here concerned with this part of his Report.

Mr. Stephen's minute was circulated to all local Governments. All agreed with his conclusions. Sir George Campbell, the Lieutenant-Governor of Bengal, who had been a High Court Judge, ordered magistrates to interfere more directly in police cases. He accepted Mr. Stephen's principle of the division of functions into executive-criminal-judicial and civil-judicial, and that particular magistrates should be appointed to try criminal cases. This so far was an acceptance of the principle of separation. Sir George Campbell, it may be noted, had spent his service in the North Western Provinces, where the need for separation was looked on as less important. Sir George was an uncompromising advocate of centralisation in the hands of the district magistrate, or, as he tried to

make him, district autocrat. The differentiation of functions which the development of India was gradually making necessary, was undermining the authority of the magistrate as executive chief of the district. Departments, he said, were ruining the empire. He therefore tried to reassert the power of the district magistrate as the real executive chief and administrator of the tract of country committed to him, and to make him supreme over every one and everything, except the proceedings of the Courts of Justice. Departments, he said, were excellent servants, but bad masters, and he strongly believed in the concentration of authority and the personal rule "so consonant to oriental habits and feelings." The police he completely subordinated to the Magistrate-Collector, so much so that he forbade the Superintendent of Police to correspond even with his own Inspector-General save through the Magistrate. For all and every purpose the police were subordinate, he declared, thus stifling an antagonism which was growing up between the magistracy and police and which in itself might have separated the much discussed functions.

Sir George Campbell's administration is notable for his introduction of the so called parallel promotion in the Indian Civil Service, which was started in 1873, and which has been the only real separation of functions actually

carried into effect. His object was to secure better training for judges and executive officers alike, and to prevent officers shifting at random from the executive to the judicial branches of the service, and *vice versa*. He compelled officers of the Civil Service, after a few years' service, to choose definitely which line of the work they preferred, and he arranged pay and promotion in such a way as to give fairness of treatment to each branch. The controversy over this question raised a mass of papers almost equal to those concerning the separation of functions. The controversy was protracted, involving several successive Secretaries of State, Governors-General, and Lieutenant-Governors. Though the details of the scheme led to much argument the basis continued.[1]

The heads of other provinces of India—Sir George Couper of Oudh, Sir John Strachey, of the North-Western Provinces, Sir Charles

[1] This cognate subject of the training of judicial officers has been responsible for many despatches, letters, notes, minutes, reports, etc. With the details of this question we are not concerned, but the papers relating to it show many shades of opinion on the general question of separation. All were agreed on two cardinal points—the weakness of the existing system, and the necessity for better training. Some officials (*e.g.*, Mr. Dampier the Chief Secretary of Bengal) definitely said that separation of functions was the only solution. The papers are interesting as revealing the views of men whose names are now well-known in Bengal, some of them well known beyond Bengal, *e.g.*, Sir Ashley Eden and Sir Rivers Thomson, both Lieutenant-Governors of Bengal, and the two notable jurists, Sir Henry Maine and Sir William Markby.

Aitchinson, of the Punjab, and Sir Philip Woodehouse, of Bombay—as well as Sir Peter Lumsden, then Resident at Hyderabad—agreed with Mr. Stephen's conclusions, with the result that neither in the re-enactment of the Code of Criminal Procedure then pending, nor in the later re-enactments of the Code was the separation effected. In Sir John Strachey's well known book on "India: Its Administration and Progress," his opinion is thus expressed—(Sir John's remarks applied to the Regulation Provinces) "We often hear demands for the more complete separation of executive and judicial functions in India, but they are demands based on the assumption that because this is good for England it must be good for India also. There could be no greater error. The first necessity of good administration in such a country as India is that it should be strong, and it cannot be strong without the concentration of authority. In the everyday internal administration there is no office as important as that of the Magistrate and Collector. He is one of the mainstays of our dominion, and few steps could be taken in India which could be more mischievous and dangerous than to deprive him of those powers which alone enable him to maintain his position as the local representative of Government."[1]

[1] This quotation is important, as Sir John Strachey has been quoted as supporting the other side, on the strength of a note to a

Another supporter of Mr. Stephen's conclusions was Mr. West, Judicial Commissioner in Sind, later Sir Raymond West, of the Bombay High Court. A note of Sir Raymond West was submitted in support of the Hobhouse memorial. Like several other signatories, he had retired from service.

Under Lord Ripon's Government, in 1883, an analysis was made by the Government of India of the system of criminal justice and police administration in India. This analysis revealed several noteworthy facts. In the first place, it showed how the law in regard to the control of the police was observed. No magistrate other than a District Magistrate could in any way control the police. A sub-divisional officer could order an enquiry into a case by the official-in-charge of a local police station, but beyond that his control over the police did not extend. The Magistrate could order any police officer to make an enquiry. In the second place, the enquiry showed that District Magistrates rarely tried cases themselves in which they personally had given directions to the police. In some cases—usually urgent cases—Magistrates tried cases in

Minute containing remarks by Sir Henry Maine (then Mr. Maine) on the "shameful inefficiency" of the judges. Sir John's remarks applied not to separation, but to the inefficiency of the Judges. He officially repudiated any statement of agreement as implying agreement with separation in a letter to Sir Charles Elliott, Lieutenant-Governor of Bengal, himself an uncompromising opponent of separation.

which they themselves had initiated the proceedings, but it was at least arguable that in such cases the judicial powers of the Magistrate were conducive to public peace and order.

The enquiry also showed the interesting result that the number of criminal cases tried by District Magistrates all over India was very small. The figures were (percentages of such cases in the year 1882):

Central Provinces ...	7
Burma	7
Punjab ...	4 to 5
North-Western Province ...	$2\frac{1}{2}$
Oudh	$2\frac{1}{2}$
Assam	$2\frac{1}{2}$
Hyderabad	$2\frac{1}{2}$
Bengal ... less than	1
Bombay	5
Madras	18

One of the most remarkable results, as shown by the High Court reports, was that only fourteen cases were found in which unfavourable remarks were recorded regarding the union of powers. Practically all the High Courts in India recorded their opinions in favour of the existing system. The only difficulties in the system, it was recorded, had been in Bengal.

The controversy now passed from administrative minutes and reports into the arena of politics. The subject was brought up year after year at

the Indian National Congress, from its foundation in 1886. The culmination of the Congress debates was reached in 1899, when a memorial signed by Lord Hobhouse, Sir Richard Garth, Sir Richard Couch, Sir Charles Sargent, Sir William Markby, Sir John Budd Phear, Sir John Scott, Sir William Wedderburn, Sir Roland Wilson, and Mr. H. J. Reynolds, was presented to Lord George Hamilton, Secretary of State for India, by Sir William Wedderburn and Mr. H. J. Roberts. For some years previously the subject had been discussed by various writers in *India* and the *Asiatic Quarterly Review*. In 1893 the paper *India* published a practical scheme by Mr. Romesh Chandra Dutt of the Indian Civil Service, which aroused much discussion, and which was presented by the above-mentioned memorialists as a feasible scheme to be put into operation at once. The discussion was taken up by retired members of the Civil Service, such as Sir Charles Elliott, late Lieutenant-Governor of Bengal, and Mr. H. J. Reynolds, a signatory to the memorial, who had been Secretary to the Government of Bengal and a distinguished administrator. Mr. Reynold's article in reply to Sir Charles Elliott's criticism of the separation showed an animosity which may have reflected ancient official grudges. Anyhow, these retired gentlemen waxed somewhat hot in their controversy. The memorialists were further helped

by pronouncements in favour of separation by two successive Secretaries of State, Lord Kimberly and Lord Cross. Mr. Bhownaggree also had raised the subject on the Indian Budget Debate in 1896.

These various speeches, articles and opinions were all collected and presented with the memorial. The memorial was divided into three parts—a historical survey (which was an *aperçu* of the facts and opinions already given in this paper), a statement of the existing grievance and the remedy, and a series of answers to possible objections. In its statement of the existing grievance and the remedy, the memorial gives eight grounds on which their argument for the abolition of union was based. These were (1) that the combination of judicial with executive duties in the same office violates the first principles of equity, (2) that while a judicial officer ought to be thoroughly impartial and approach the consideration of any case without previous knowledge of the facts, an executive officer does not adequately discharge his duties unless his ears are open to all reports and information which he can in any degree employ for the benefit of his district; (3) that executive officers in India, being responsible for a large amount of miscellaneous business, have not time satisfactorily to dispose of judicial work in addition; (4) that, being keenly interested in carrying

out particular measures, they are apt to be brought more or less into conflict with individuals, and, therefore that it is inexpedient that they should also be invested with judicial powers; (5) that under the existing system Collector-Magistrates do in fact, neglect judicial for executive work; (6) that appeals from revenue assessments are apt to be futile when heard by revenue officers; (7) that great inconvenience, expense, and suffering are imposed upon suitors required to follow the camp of a judicial officer, who, in the discharge of his executive duties, is making a tour of his district; and (8) that the existing system not only involves all whom it concerns in hardship and inconvenience, but also by associating the judicial tribunal with the work of police and detectives, and by diminishing the safeguards afforded by the rules of evidence, produces actual miscarriages of justice, and creates, although justice be done, opportunities of suspicion, distrust and discontent which are greatly to be deplored.

The "possible objections" to which answers were given were three, *viz.*,—(1) that the system of combination works well and is not responsible for miscarriages of justice; (2) that the system of combination however indefensible it may seem to Western ideas, is necessary for the position, the authority, in a word, the "prestige" of an oriental officer; and (3) that the separation

would involve a greater expenditure than the finances of India could stand.

The first two arguments I shall examine later; the third was answered by the memorialists in the acceptance of Mr. R. C. Dutt's scheme, which provided for separation, as the memorial stated, "without any additional expense whatsoever." "Similar schemes for other Presidencies and Provinces have been framed," said the memorial, "but it was understood the most serious financial difficulty was apprehended in Bengal."

Mr. R. C. Dutt's scheme he himself declared to be "simple." He proposed that the District Magistrate should be called the District Officer, and that his work should be purely executive. All his judicial functions should be transferred to the District Judge. Of the subordinates of the existing District Magistrates, those employed on purely executive work should be placed under the District Officer, those employed on judicial duties should be placed under the District Judge. Of the subordinates of the District Magistrate who exercised judicial functions (Assistant Magistrates and Joint Magistrates, who are members of the Indian Civil Service, in the lowest grade) Mr. Dutt proposed to dispose in this way. Assistant Magistrates should be employed purely on executive and revenue work for two or three years. During these

years, they would, as now, pass the ordinary departmental examinations in law, accounts and languages ; but they would not, as now, try petty criminal cases. In this way, argued Mr. Dutt, the Assistant Magistrates would learn their executive work better, and, by coming to know the people, would prepare for the next stage—the stage of Joint Magistrate. Joint Magistrates, he proposed, should be employed on judicial work purely. As assistants the young magistrates thus would be under the District Officer; as Joint Magistrates they would be under the District Judge. They would thus receive better training both as future District Officers or Judges.

Deputy Magistrates Mr. Dutt proposed should be divided in two sections, one for executive work, and one for judicial. The exact proportion of Deputy Magistrates per function and per district would depend on the amount of work to be done.

The results of Mr. Dutt's scheme thus would have been that the District Officer would have become chief executive officer, responsible for revenue, police and miscellaneous duties. He would have continued to inspect his subordinates, but they, like him, would have been divested of judicial powers. The District Judge, in addition to his normal duties, would have taken over these duties, and have had a staff of new subordinates

engaged on similar duties, whom he would have had to inspect and supervise. His arrangements for subdivisions were that the existing subdivisional magistrates (assistant magistrates or deputy magistrates) should be given judicial functions only, and that the revenue and miscellaneous functions should be performed by sub-deputy collectors. He supported his scheme by arguing that not only judicial and executive separation would thus be achieved, but the executive work would be better done. Hitherto subdivisional officers had given much inconvenience to other departments when they were on tour, as the normal functions of the treasuries were then suspended. Mr. Dutt did not show how the new officials, or sub-deputy collectors, would overcome this inconvenience.

Mr. Dutt allowed for modifications in his general scheme for particular districts, and in a later article adopted a suggestion made by Mr. H. J. Reynolds that officers of the Provincial Service (deputy magistrates), of the Subordinate Service (sub-deputies) should be employed for executive work in the bigger sub-divisions.

A name which figured largely in the literature accompanying the memorial was that of Mr. Monmohan Ghose, a very distinguished lawyer, of whom the town and College of Krishnagar are justly proud. Mr. Ghose had a very large practice as a criminal advocate, and his ability

was unquestioned. Accompanying the memorial was a copy of an "Interview" of him by *India* published in 1895. The Interview was more in the nature of an article. It presented concisely and clearly, if one may so put it, the case for the prosecution. But like the other parts of the memorial, it was a lawyer's case. Mr. Ghose's chief contribution to the accompanying papers was a list of twenty cases illustrative of the evils of separation. The twenty cases aimed at showing abuses of power by District Magistrates acting in their judicial capacity. In some cases the abuse was obvious enough, but in several others it was at least arguable that the cases showed the well-meant, though ill-advised, use of a magistrate's preventive powers. In almost every case the evil was due to over-zealous or incompetent officials more than to the actual system itself, though, of course, the system gave power to these officials. In every system however, whether perfect or imperfect, much depends on the individuals who "run" it. In the most perfect judicial system in the world there are bad judges, judges who overstep their legal limits of power, indiscreet judges, and lazy judges. On the other hand many a bad system has been successful because of its good personnel. In any case, Mr. Ghose's compilation was unfortunate, for it promptly laid the way open for the effective reply that if in all the

years of united powers, these few cases alone—and some of them were questionable examples—existed, then surely the system was well nigh perfect. Few systems of justice could boast of such a record—and what was even more pointed—the Reports of the High Court did not, or could not furnish further cases.

The scheme was almost bound to be ill received by the officials actually carrying on the administration, because most of the signatories had had such limited experience of administration. Moreover, to the official in service there is something distinctly aggravating in being criticised by men retired from service. Free from the actual cares of office or administration, and living comfortably in the easy oblivion of service difficulties which comfortable London or provincial clubs encourage, these retired men often contract the habit of condemning the system of government of which, in their days of service, they were active supporters, both in theory and practice. The ease of retirement, too, seems to beget a forgetfulness of the complex problems of Indian administration. The return to their own homes and administrative system eliminates from the consciousness of many ex-officials the vast differences there are between the problems of an Indian district and those of an English county. Perhaps even their

sated consciences recoil on the enormities they think they have committed in their earlier lives. They therefore use their annuities to recant: they make a new declaration of political faith. To some the well earned period of leisure is spent in the fulmination of ancient grudges, or in condemning a system to which they only give lip, or pen service in the days of their activity. Others relieve their breasts of pent-up personal differences. When the official whip no longer stings, when the higher post no longer allures, when the coveted decoration is lost or won, the tongue and mind are free. The reckless word or speech, the unorthodox theory, the insubordinate temper no longer meet the angry frown of superiors. In the clubs or drawing rooms, in the pamphlets and press, the retired magistrate is as good as the ex-lieutenant-governor. The only person that suffers is the forgotten toiler in the districts of India, struggling with a new and perverse generation, whose task is made the more difficult because of the free tongues and pens of his now unemployed predecessors. Some of these predecessors, more thoughtful or more honest than others, hasten to forget their past difficulties in the resumed environment of their youth. Others, in signing memorials or writing pamphlets have the modified honesty as they write to sigh—"Yes—but thank God, I've retired from the service."

The Hobhouse memorial was a weighty document, not so much because of its arguments and presentation of the case, but because of the names appended to it. Its first signatory was Lord Hobhouse, who had been Legal Member of the Governor-General's Council from 1872-1877. Following his name were those of Sir Richard Garth, and Sir Richard Couch, both of whom had been Chief Justice of Bengal. Sir John Budd Phear had been a Judge of the High Court in Calcutta, and, later, Chief Justice of Ceylon. Sir William Markby, Sir Charles Sargent and Sir John Scott had been Judges of the High Court in Calcutta. Sir William Markby, later, was Reader in Indian Law at Oxford, and is in the first rank of modern jurists. Sir Roland Wilson was a distinguished lawyer. Sir William Wedderburn was a successful Bombay Civilian who afterwards became President of the Indian National Congress. Mr. Reynolds was in his time Secretary to the Government of Bengal and one of the most distinguished revenue administrators Bengal has known.

Imposing as is the list of names, one or two salient features are worthy of remark. In the first place, the list contains the names of only two men with administrative experience, Sir William Wedderburn and Mr. Reynolds. In the second place, of these two

Mr. Reynolds was mainly a Secretariat man. His experience of district administration was relatively small. In the Service, too, he was known as inclined more to philosophical speculation than to facing facts as they stood. In the third place, one or two of the members had been known to express themselves differently on the question, *e.g.* Sir John Scott who in 1900, in the Proceedings of the Society of Arts had declared the matter to be "of small urgency."

The mass of articles, memoranda, and evidence produced with the memorial was equally open to criticism. Sir Richard Garth in particular indulged in extreme language scarcely to be expected from a man of his training. He wrote of the disgraceful state of things in Bengal, of the "grievous injustice to which it is constantly giving rise," the utter fallacy of the excuses which are made by the government for not rectifying "this shameful abuse." The real truth is, he said, "that the government of India *approves* this scandalous system, and (whatever the Secretary of State may say to the contrary) would be sorry to see it altered. In point of fact, if the government had its will, the independence of the judges would be still further controlled, and the High Courts themselves made subservient to the will of the Executive."

Such statements from an ex-Chief Justice did not help the memorial. The history of the

case shows that there was reason for the system, and the imputation regarding it was not only undeserved but unjust. The extreme and violent nature of Sir Richard's statements were brought into bold relief by the moderation of his fellow lawyers.

The authority of Sir Robert Reed, who was at one time Attorney General, was also enlisted—unnecessarily, for no one, either lawyer or administrator, had questioned the truth of the juristic principle of separation. Sir Charles Elliott's article was introduced as a stalking horse. The replies of Mr. Reynolds, Dr. Field (an ex-Judge of the High Court, whose experience of administration was practically nil), and Sir John Budd Phear were the real reasons for the inclusion of Sir Charles' article.

Another weakness of the memorial was its ready acceptance of the fact that Mr. Dutt's scheme would cost nothing. In Bengal alone it was calculated that a recurring expenditure of eleven and a half lakhs would be necessary, with about another four lakhs for non-recurring expenditure (houses, court-houses, offices, etc.). This estimate included the savings possible under the scheme. These estimates were made in 1901, and were the scheme revived, they would probably now amount to twenty-five lakhs.

The memorial did not have immediate effect, but it had real effect some years later, when the Government of India definitely declared its intention to introduce separation in selected districts in Bengal. The mouthpiece of the Government of India was the Home Member, Sir Harvey Adamson, later Lieutenant-Governor of Burma. Sir Harvey Adamson's scheme was propounded in the Imperial Legislative Council in March, 1906. He informed the Council that the Government of India had decided to advance 'cautiously and tentatively' towards the separation in those parts of India where the conditions were considered to be appropriate. The experiment, he said, would be costly, but the Government of India thought it 'worth while.' The experiment was to be started in the Bengals (Eastern Bengal was then a separate province). The reasons why Bengal was chosen were several. First, most pressure had been applied from Bengal; second, the intellectual character of the Bengali was supposed to be more adaptable to changes; third, the revenue system of Bengal, the easiest in India, was the best field for experiment; fourth, in Bengal, there was no machinery except the police to perform duties which in other parts of India were done by the better class of revenue officer; fifth, as Sir Harvey expressed it, "There are more lawyers in Bengal than elsewhere"; and sixth, at least as Sir Harvey "suspected,"

the District Magistrate interfered more with police functions than in other provinces.

The principles enunciated by him are:

1. Judicial and Executive functions to be entirely separated to the extent that an officer who is deputed to executive work shall do no judicial work, and *vice versâ*, except during the short period when he is preparing for departmental examinations.

2. Officers of the Indian Civil Service to choose after a fixed number of years' service whether their future career is to be judicial or executive, and thereafter to be employed solely on the career to which they have been allotted, the allotment to depend on choice modified by actuarial considerations.

3. Officers of the executive branch of the Provincial Civil Service and, if possible, members of the Subordinate Civil Service to be subject to the same conditions as in (2), though the period after which choice is to be exercised may be different.

4. During the period antecedent to the choice of career officers of both services to be gazetted to Commissioners' divisions and to be deputed to executive or judicial duties by the Commissioner's order.

5. During this period deputation from executive to judicial, or *vice versâ*, to be made at intervals not longer than two years.

6. High Courts to be consulted freely on questions of transfer and promotion of all officers allotted to the judicial branch.

7. Two superior officers to be stationed at the headquarters of each district—the District Officer and the Senior Magistrate.

8. The District Officer to be the executive head of the district, to exercise the revenue functions of the Collector and the preventive magisterial powers now vested in the District Magistrate, to have control over the police, and to discharge all miscellaneous executive duties of whatever kind.

9. The magisterial judicial business of the district to be under the Senior Magistrate, who is to be an officer who has selected the judicial line, either an Indian Civilian or a Deputy Magistrate of experience. He is to be the head of the Magistracy, and his duties are to be (1) to try important criminal cases, (2) to hear appeals from second and third class Magistrates, (3) to perform criminal revision work, and (4) to inspect Magistrates' Courts. In districts where these duties may not give him a full day's work he is to be appointed an Additional District Judge and employed in civil work and in inspecting civil courts. If, where the Senior Magistrate may be an officer of the Provincial Civil Service, it may be considered inexpedient on account of his lack of experience to give him

civil work, he may be appointed Assistant Sessions Judge. In either capacity he would give relief to the District and Sessions Judge.

10. At head-quarters of districts where there are at present Indian Civilians, Deputy Magistrates and Sub-Deputy Collectors, a certain number to be deputed to executive, and the remainder to judicial work.

11. Sub-divisional boundaries to be re-arranged, and each district to be divided into judicial sub-divisions and executive sub-districts. The boundaries of these need not be coterminous. The area of a judicial sub-division to be such as to give the judicial officer in charge a full day's work, and similarly with executive sub-districts. Boundaries to be arranged so as to disturb existing conditions as little as possible.

12. Thus the whole district is divided into:—

A. Executive—

(*a*) Head-quarters. (*b*) Sub-districts;

B. Judicial—

(*a*) Head-quarters. (*b*) Sub-divisions.

The staff is divided into—

A. Executive, under the District Officer, namely:—

(*a*) The District Officer.

(*b*) A certain number of Indian Civilians. Deputy Collectors and Sub-Deputy Collectors at head quarters.

(*c*) An Indian Civilian or Deputy Collector for each sub-district.

B. Judicial, under the Senior Magistrate, namely :—

(*a*) The Senior Magistrate.

(*b*) A certain number of Indian Civilians, Deputy Magistrates and Sub-Deputy Magistrates at head-quarters.

(*c*) An Indian Civilian or Deputy Magistrate for each sub-division.

13. The District Officer to be empowered as a District Magistrate, and certain other executive officers to be empowered as first class Magistrates, solely for the performance of the preventive functions of the Magistrate [as in Chapters VIII (omitting section 106) to Chapter XII of the Code of Criminal Procedure.]

Many other schemes, or suggestions have been put forward from time to time. Some have suggested that the present system should in the main continue, but that the appellate powers of Magistrates should be withdrawn and transferred to the District Judge. Others have suggested that while the present powers of the Magistrate in other respects should be continued, the powers of supervision and control over the lower magistracy should be taken from the District Magistrate and given to a judge of lower status than the District Judge, a Divisional Judge being created as the head judicial

officer in each division. It has been suggested that the powers of supervision by the Magistrate should be merely nominal, no special machinery for supervision being suggested. It has also been suggested that the police should take over absolutely the police functions, leaving the judicial functions with the Magistrate. Various schemes for the division of functions in the subordinate magistracy have been put forward, many of them on the lines of Mr. Dutt's scheme. Others have suggested a special magisterial service of government, on the lines of the Indian Civil Service but distinct from it.

Many of the schemes suggested have an air of unreality about them. A more earnest scheme, however was propounded in 1913 by Mr. P. C. Mitter, in his monograph on *The Question of Judicial and Executive Separation.* Mr. Mitter's is one of the best worked out practical schemes that have been written on the subject. He accepts, in the main, Mr. Dutt's scheme, but he goes beyond it in placing the Judicial Department of Government under the High Court, and in advocating a Judicial Service in India, which, he recommended, should be divided into two parts, Imperial and Provincial, and should be recruited partly by a competitive examination in London and partly by local recruitment from the bar. Mr. Mitter worked out his scheme in great detail and with much care. He included

a complete course of legal training and a detailed estimate of the cost. In suggesting a Judicial Service Mr. Mitter brings to a head the century old controversy regarding the training of judges. His scheme also compels one to consider the whole system of "Service" government, a matter on which I shall speak presently. Mr. Mitter's is the last scheme of any importance that has been published.

The last important debate which took place on the subject before the Reforms was in March, 1913, when the Hon'ble Sir Surendranath Banerji in the course of the Budget debates, moved that the grants to the provincial governments should be increased so as to enable them to carry out the experiment outlined by Sir Harvey Adamson. The debate was a very moderate one, the speech of Sir Surendranath himself being very non-provocative in tone. Sir Surendranath was supported by all his Indian non-official colleagues in the Council, but his motion was negatived by the official *bloc*. The debate was somewhat unreal as a debate, as it was raised on the budget estimates, which in all countries are inelastic as far as non-official proposals are concerned. The motion was more an expression of opinion on a much debated topic than a real test of political or official strength.[1]

[1] The question has already been raised in several of the reformed Legislatures (in 1921).

III

CRITICISM OF THE PROBLEM

To appreciate the problem of separation, one must first attack it in its most general aspect. The separation of executive and judicial functions is only a part of wider separation—legislative, executive and judicial. I have already noted that the question of separation of the legislative powers does not concern us intimately here. But it may be noted that the separation, or, rather distinction between legislative and executive has to a certain extent been achieved in India. Up to the end of 1920 the Government of India was an executive government. In spite of the existence of legislative councils for over half a century, the executive government was able to get its own way. "Getting its own way" does not by any means imply that its rule was either oppressive or opposed to the wishes of the people. In another place [1] I have tried to show how the political sovereignty of India has been behind and has moulded the legal sovereignty. In a few notable instances, it is true, the measures of the government have been in sharp antagonism to the declared will of non-official members of the

[1] Indian Nationality—Longmans, Green & Co.. 1920.

Legislative Councils; but on the whole, the executive-legislative governments of India worked single-mindedly with the representatives of the people for the good of the people of India.

Now the executive is partially responsible to the legislature. Such responsibility is not separation : it is subordination. Modern democracy has preferred not to adopt the American thoroughgoing separation of legislative, executive, and judicial functions. Indeed, America herself despite her Constitution has found extra-constitutional methods of reducing an *a priori* theory of liberty to the terms of executive practicability. As an aftermath of the most recent constitutional *bouleversement* of all—that of Germany—we find that the most advanced democracy of to-day,—at least in name—Germany, has accepted that type of separation which is really union—*viz.*, responsible government. Nor again, in modern constitutions do we find the rigid separation of executive and judicial which separation theorists demand. From the very nature of executive work, every executive action presupposes a judicial decision—except in cases of sheer unreason. Judicial work, too, involves executive work. Apart, however, from these general facts, the executive and judicial are closely interlinked by the prevailing method of appointing judges. The method most approved by administrative experience for the appointment

of judges is appointment by the executive. Other methods of appointment, it is true, exist. In many American states the judges are elected by the people. In some governments they are appointed by the legislature. The prime desideratum in a judge is independence—both as regards his opinions and his financial prospects. Thus the rule has grown up that judges should receive a fixed sum as salary unalterable during the tenure of their appointment. This secures, or should secure financial independence; but even more important is independence of opinion. Popular election obviously does not secure such independence, especially where such election is for a short term and re-election is possible. A judge thus becomes little more than a popular puppet. Election by modern legislatures means party elections, and party judges are bad judges. The very conditions of election by party are the negation of the judicial frame of mind. Selection by the executive is the most satisfactory method of appointing judges, such selection being made, as it is in well ordered governments, after consultation with the recognised head of the judicial system, or a panel of judges.

The classic theory of Separation is that of Montesquieu, which, because it is rarely quoted in full, I quote:—

"In every Government there are three sorts of power: the legislative; the executive in

respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

"By virtue of the first, the prince, or magistrate, enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the State.

"The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted that one man be not afraid of another.

"When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty because apprehensions may arise, lest the same monarch or Senate should enact tyrannical laws to execute them in a tyrannical manner.

"Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control. Were it joined to the

executive power, the judge might behave with violence and oppression.

"There would be an end of everything were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

Blackstone, the English jurist, in a much quoted passage, expresses the theory in these words:—"Whenever the right of making and enforcing the law is vested in the same man or one and the same body of men, there can be no public liberty. The magistrate may enact tyrannical laws and execute them in a tyrannical manner since he is possessed, in his quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself.

"Were it (the judicial power) joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges whose decisions would be regulated only by their opinions, and not by any fundamental principles of law, which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union would be an overbalance of the legislative."

Without the usual academic analysis of the various bearings of the theory, I may note several salient points. First, the theory was adopted

in the American Constitution so thoroughly that there was a danger of deadlock between the executive and legislative. The thorough-going nature of the American party system is largely explained by the rigidity of separation. It is an extra-constitutional method of overcoming legal difficulties.

Second, the English constitution is a direct negation of the theory, yet the English constitution was Montesquieu's ideal type. The English system exemplifies almost complete union. The King is nominally head of the three powers. Actually, the executive (the Cabinet) is composed of members of the Legislature. One house of the legislature, the House of Lords, is a supreme Court of Appeal. Several of the highest legal functionaries, including the chief, the Lord Chancellor, are members of both the executive and legislature.

Third, the American system proves how a people may actually suffer in order to test a theory. The rigidity of the separation is accountable for the prevalent elections in America to both minor executive and leading judicial posts. Election for judicial posts is particularly pernicious in principle and in practice, though actually the abuse in America is not so great as might be expected.

Fourth, in France and continental Europe generally, the system of administrative law, by

which executive officers are subject to different law and procedure from private citizens, contradicts the theory. Administrative law is opposed to English ideas, yet it is an ingrained part of continental constitutional practice. In two notable modern constitutions—those of Japan and Germany—the system has been adopted. The recent adoption, or rather, continuance of administrative law by Germany, with the most democratic constitution of recent times, is most significant.

Fifth, the state is an organic unity, and the theory of separation forgets that the machinery of the state is the organisation of an organic unity. The theory attempts, as it were, to separate artificially the arms, legs and trunk from the body politic. A body can function properly only when its parts function properly with the whole.

The theory of separation, whether it be the separation of three powers, or the two powers with which we are concerned is an excellent instance of modern theories of liberty. It is also an instance of a modern theory controverted by fact. *Primá facie*, the statements of Montesquieu and Blackstone seem final, but on analysis or comparison with constitutional fact, they pass into the limbo of many of our modern shibboleths of liberty. Liberty does not depend on system. The passion for system made many constitutions

and reformed many effete governments in the last two centuries; but it did not secure liberty. No amount of general statements of freedom written down in a constitution, no *a priori* system of separation of powers will produce liberty if the spirit of liberty is wanting. A people is free because it breathes the spirit of freedom. America separated the "powers." She built walls round them, placed spikes and broken glass over them; but the American people surmounted the walls. The very theory of government which promised their liberty actually threatened them with autocracy. They could not amend the constitution by the ordinary legal process, but they invented a party system which circumvented the separation. Nevertheless, the separation exists in America, more than in any other modern constitution. In England, according to the theory of separation, absolutism, oppression, tyranny, every extreme of wickedness in government should be rampant. But it is not. In England the "powers" are mixed up like an apothecary's mixture. Yet England is notoriously a free country. And why? Because her people love neither oppression nor anarchy: they love the Rule of Law, where every man and his master or servant are subject to the same legal process. Neither constitutions nor laws are steel girders; they are the mind—or moral—matter of a people; they are the

reflexion of their *selves*. Among a free people laws, if too stringent, will bend or break; but in themselves they cannot continue to oppress. System, laws, rules, departments do not make liberty. They may help, but unless they are helped in return by the moral force of the people, they are futile. Nowhere is this more evident than in India. Nowhere is there a greater tendency to circumvent laws, and, it may be added, nowhere is there the same success in circumventing them. Much as our new democratic institutions have been lauded, the warnings of many thinkers that the social and mental composition of India may not give democracy though the *forms* of democracy exist, are not without reason. The recent experiences of social boycotts and non-co-operation have more meaning than the casual observer may note. They are the first manifestations of an intolerance and autocracy which are inherent in the traditions of the people. If America, with her separation, and if England with her mixture—and both the separation and mixture are cardinal constitutional facts—are free with them or in spite of them, does it not argue that separation in itself is not the fulcrum of freedom?

The union of powers, as Sir Harvey Adamson excellently pointed out, and the separation of powers suit communities according to their stage of development. The extreme case is martial

law, where the executive becomes supreme. It is its own legislature and its own judiciary. In cases of great disorder or of revolution the rigid forms of laws or the elastic arguments of lawyers are out of place. Action, not argument, is the essence of martial law, and action of this kind requires the supremacy of the executive. Then, again, in simple primitive or savage communities the best system is personal rule. Historically this has been so. In all early communities the rule of the priest or king, or chief magician, or priest-king, or magician-king was responsible for law making, and the execution and the interpretation of the law; and, as Sir J. G. Frazer points out, these rulers were responsible for the first stages of social progress. Order is the prime necessity of progress, and order requires "strong" government. "Strong" government means a quick, decisive executive, untrammelled by legalism.

And so we may advance, up the scale. In developing communities, the social consciousness of which is strong enough, or is becoming strong enough to resist the more primitive instincts towards disorder, partial union and partial separation may be necessary or advisable. In India, therefore, the question of separation turns on the stage of development of the country and its respect for order. But the peculiar circumstances of India must be taken into account. The development of India varies from that of

primitive tribes to advanced provinces where complete separation is already practically a reality. Even in advanced communities latent possibilities of disorder, due to religious, social and political differences always exist. In the controversy the lawyers have made the most of their case. They argue that the greater part of India is sufficiently developed to bear separation. The executive, on the whole, have taken the opposite view. Their function is to preserve peace: they therefore wish the most effective weapons for that purpose. "Each profession," to quote Mr. George Bernard Shaw, "is a conspiracy against the laity." Each tries to make the most of its own duties and responsibilities, and the oscillations of the professional needles must be governed by more or less neutral authorities. The pragmatic sanction of experience is ultimately the test.

The argument, therefore, that the separation of functions is necessary to prevent oppression, or for the freedom of the people, while it sounds well, may not actually work out well in practice. It is not without reason that many public servants and private individuals in India have insisted on the union of powers as essential to the freedom of the individual. This point of view has not been expressed from the general idea that the greater the peace and order of a community the greater the freedom. The gist of official argument

indeed has been that the District Magistrate, as responsible for law and order, must perform these double functions. As such the union is conducive to freedom. But from actual administrative experience it has been argued that the aim behind the separation controversy has been to place the criminal courts in the hands of an agency free from the interference of the District Magistrate, and thus serve the interests of lawyers. Perhaps no agency more than the district magistracy has so unflinchingly and unswervingly hunted out and put down false cases—a curse of India's public and private life. False evidence, the use of professional witnesses, the institution of cases from *zid*, or the desire to vex, harass, or ruin, have been rigorously and uniformly opposed by the district magistrates, as well as the judges. It is also argued by "separationists" that the magistracy is distrusted. The implication seems to be that the civil courts are trusted. But, it may be asked, are the civil courts more trusted by the people than the magistrate's courts? In the average villager's mind which does he fear more, or, rather, which does he trust more? It is at least arguable that the villager is more oppressed by the technicalities and legal formalities of the civil courts than by the direct action of the magistrates' courts. No one who has the slightest acquaintance with the civil courts of Bengal will say that they are

not capable of improvement from the point of view of justice, or oppression. Nor again is it obvious that the 'weak and oppressed,' or poor classes would fare better under a more legalistic system. Does anyone honestly believe that in civil justice at the present time the poor man has an equal chance with the rich, or the *Bhadralog* classes.

The general theory of Separation of Powers thus teaches us to beware of general statements or theories of liberty. It is very easy to voice general propositions or theories, as the Indian lawyers and English philosophical radicals who have given their support to separation have done—and to draw deductions from them in respect to actual facts. But first these general statements and theories should be tested. The minor premiss and conclusion of a syllogism are valueless if the major premiss is untrue. In these days, unfortunately, we only too often find instances of what may be called the Fallacy of the Major Premiss. It is the duty of scientific and judicially minded men to give to the people correct major premisses. This is peculiarly the case with the Political and Economic Sciences, which so vitally affect the everyday lives of citizens. The main functions of these Sciences is, in the first place, to establish correct theories or major premisses, and in the second place to drive these home to the people at large.

So, in India, the general idea of separation has been often accepted without an adequate notion of what is implied by separation, and how separation has worked in actual practice. Behind the many debates and memorials on separation has been a vague idea of liberty—an idea as vague as the connexion between liberty and mere government organisation is vague. Nowhere more than in India are we liable to fall into the fallacy of the Major Premiss in regard to political and economic doctrines. In a country which has so rapidly assimilated western ideas, transition in thought from what is good for Europe to what should be good for India is easy enough and natural enough. But it is dangerous. India is not Europe, and never will be Europe, and one of the chief virtues of the modern nationalistic movement in India is to drive that into the minds of Europeans and Indians alike. But for good or for bad, the administrative machinery of the West, and, largely, its economic machinery have been imported into India, and we must make the best of them. We must find them their place among the indigenous rolling stock. Above all, we must beware of sudden shocks or breaks. What is most wanted is gradual adaptation of western means to Indian ends, and in the subject before us we have a most excellent example of the process.

The indigenous system of government of India when British administration first began to take hold was a sort of patriarchal absolutism. True, the government was partially a foreign or Muhammadan government. Alike for Hindus and Muhammadans the recognised system of government, as laid down by their recognised sacred writings, was absolutist. For Moslems, the ruler was absolutist, combining the three functions in himself. Both the example and the teaching of the Prophet bear this out. The early agitation, however, was conducted by Hindus. What then, we may ask, is the Hindu system ? The late Justice Dwarka Nath Mitter, a name honoured in Bengal, and one who in his time as a High Court Judge, had to write notes on the controversial issues which came before him as an official, wrote, "The history of the Hindu polity is the development of the moral system of Manu. The national mind has rested, as it were upon his teachings. That the moral system of Manu has so long preserved its influence is due simply to the fact that it was precisely adapted to the conformation of the Hindu mind and its surroundings. To understand Manu is to understand Hindus. He was the incarnation of the national character, a mouthpiece of national feelings......The system established by the institutes of Manu can only disappear with the

national genius, and history knows no calamity more dreadful than the destruction of a nation's genius."[1]

What then does Manu teach? "For the king's sake," says the *Institutes*, "the Lord formerly created his own son, Punishment, the protector of all creatures, an incarnation of the law formed of Brahmo's glory. Having fully considered the time and the place of the offence, the strength and the knowledge of the offender, let him justly inflict that punishment on men who act unjustly. Punishment is in reality the king.........If the king did not, without tiring, inflict punishment on those worthy to be punished, the stronger would roast the weaker like fish on a spit.........A king desirous of investigating law cases must enter his court of justice, preserving a dignified demeanour, together with Brahmins and experienced counsellors. There ....let him examine the business of suitors, daily deciding one after another.........If the king does not personally investigate the suits, then let him appoint a learned Brahmin to try them."[2]

Such is the teaching of Manu, and, according to the late Justice Mitter, such is the national mind of Hindus. The interpretation

---

[1] Quoted from a letter, dated the 9th July, 1900, written by the late Mr. J. Monro, C.B.

[2] *Vide* the *Institutes of Manu*, Chapter VII. 1-37.

of that mind is largely the cause of the insistence on union of powers by the earlier English administrators. Their notes and minutes are full of references to what they call the "oriental" system of government. The "Native," they said, could not understand separation. They would never appreciate the reason why the *Hakim*, when he caught a thief could not punish him. The 'over-much occidentalists,' they said, were urging a system alien to the nature of the Hindu. In his family life he was used to the *Korta*, or head of the family, whose word was law. In the land system the zamindar was maker, interpreter and executor of law. So also, they expected their government to be. The principles of western organisation would not only not appeal to them, but, by their short-circuited logic, they might conclude that if the *Hakim* could not punish even if he caught, then retribution for malefactors was problematical.

This is not true of India only. It is true of practically every political community. All early forms of political organisation were absolutist; but in spite of religious teachings they have not remained absolutist. The Bible does not teach democracy as a form of government. Yet the Christian world is democratic—it may be the result of the Christian spirit, but not of Bible politics. The Jewish governments were theocratic—and theocracy is a most stringent form

of absolutism. Yet no one argues from this that Jews should always have a theocratic form of government. There is truth in Justice Mitter's remarks, insomuch as an organisation of government is a reflection of the mind of a people; but as Sir John Peter Grant pointed out, India is not quite in the patriarchal stage now, and his remark was much less true when he wrote than it is to-day. The evolution of administrative machinery in India has been from the patriarchal to the democratic. Sir John Grant was a little ahead of his time in his theories. He tried to force the pace of administrative evolution too much. He thought he could compress into a few years a system which had taken many centuries to evolve in the West. But three quarters of a century after his time the Governments of India have passed from the absolute system to the popular. To say that separation is not fitted for India, or that India is not fitted for separation, as many controversialists have done, is practically to deny the right of India to evolve or progress. Moreover, it is a terrible condemnation of the whole system and spirit of British administration. The British system has consistently aimed at the uplifting of India, at the progress of India, and to deny the possibility of progress is to deny the main objects of British administration. Thus to rule out the advanced

administrative forms of the West from India is illogical and inconsistent with the aims of the British connexion with India. One might as well argue that because of Louis XIV's statement, *L'état c'est moi*, that there should be no French democracy. French democracy, be it noted, was largely the result of the obstinacy of men of the *L'état c'est moi* way of thinking, men to whom progress was either anathema on religious grounds or undesirable on personal and political grounds. The French administration broke to pieces because it could not evolve.

It may be questioned, if there had been no British in India, and the present system had evolved, whether the question of separation would have ever arisen. Had Hindus themselves worked out the system, the actual separation might not be so marked as it is now. For, say what we will, the Hindu mind remains the Hindu mind in spite of all our western organisation and education. For good or evil, the western system has been introduced, and for good or evil again, we must tread the paths that the western system has beaten out for us. I am prepared to admit, with Dr Rabindra Nath Tagore and Mr. Gandhi, that the whole of our western machinery, science, and everything else, is upsetting the best traditions of the Hindus; but if the Hindus, or Indians generally, wish to

survive as a nation in this modern degenerate world of greed and discord, they must accept the recognised methods by which survival is made possible.

One of these methods is the modern system of administration, which, introduced by British administrators, is now carried on by Indians. Once introduced, we must be prepared to apply to it the ordinary canons of western administration. On this ground the logical procedure is to grant total separation of functions. It is true that India, as compared with England, is going forward at express speed. Only very recently were English J. P.'s deprived of executive functions, but in India already separation has been largely achieved in practice. What is more important, a large measure of responsible government has been introduced. It certainly seems illogical to withhold separation of executive and judicial functions, on any grounds of oriental or absolutist theories, when such a non-absolutist instrument as responsible government is already legalised. On no theoretical grounds of this kind, therefore, does a continuance of union of the powers seem justified.

On the juristic theory there has never been any dispute. It is admitted on all hands that juristically union of powers is unjustifiable: as Sir Francis Maclean, Chief Justice of Bengal, pointed out, the question of continuance is not

for the lawyer, but for the statesman to decide. The question thus arises, on political or administrative grounds is the continuance justifiable? The answer to this question is a very decided negative. For, in the first place, it is inexpedient politically to continue a system in theory which is in practice almost renounced, and which is theoretically universally condemned. It is all the more inexpedient to continue the system because it has been condemned by prominent representatives of the people and officials alike. If the system in practice is abandoned or practically so, why should not the theory be abandoned? It seems futile for any government to give reasons for grudge or complaint when they could be removed with so little difficulty or departure from existing practice. The removal of abuses is a recognised function of government; and even though the abuse be not marked, even though the agitation be artificial and unreal, the government cannot suffer by adopting a Cæsar's wife principle. Take away the cause of complaint and complaints will not arise. Assuredly other complaints will be found, but let *this* one, which has so much to be said for it, be removed.

In the second place, it is not expedient administratively. The question very naturally arises. Why, if separation in practice is the rule, does not the Government finally abolish it? One

reason is financial, but to that I pay no heed, as ways and means *can* be found if the government makes up its mind to change the system. Financial considerations have never stood, and will never stand in the way of remedy to abuses, provided the abuses are regarded as of sufficient enormity to divert public funds from other channels. In matters of this kind, financially speaking, usually where there is a will there is also a way. Were it a mere matter of finance the question could at least be solved gradually, as Sir Harvey Adamson proposed and as Sir Surendranath Banerji's Resolution in 1912 in the Imperial Legislative Council showed. The administrative question lies deeper and may be analysed from several points of view.

(*a*) It has been stated that the concentration of authority in the magistrate's hands is essential to the continuance of British rule in India. This argument, as stated by Sir James Fitz James Stephen, was often repeated after him, as a final verdict. Since Sir James's time, however, the underlying basis of this argument has completely changed. In his time the personnel of the magistracy was European, and the lack of trained Indians made the argument more effective. But the whole scene has changed. The proportion of European district officials to Indian is very small indeed. In the Indian Civil Service, in the course of the next ten years, almost fifty

per cent. of the Service will become Indian. Not only so, but the development of the Provincial and Subordinate Services has been rapid. The officers are highly qualified: they usually have taken honours degrees at the provincial Universities, and their course of training is as complete as that of officers of the superior Service.

More important still is the complete change of outlook regarding the future of India, the chief index of which is the famous "pronouncement" of August, 1917, regarding responsible government. This changes the whole administrative vista. It definitely marks out India for the Indians. The question of British rule therefore no longer applies, neither in the sense of the rule by British personnel or British services, nor the rule of Whitehall in policy. The principle of self-determination implies the gradual withdrawal of the British officials, a withdrawal which already is much in evidence. How such questions as the executive-judicial controversy will fare when there is no longer any question of foreign domination or foreign "bureaucracy" to be considered is a matter of conjecture. The whole history of India, as well as its social composition, points to a reversion to "prestige," if not to bureaucracy.. But these contingencies need not trouble us here. All one need say is that the historian of the transitional period will have a most interesting task.

(*b*) It has frequently been contended that the concentration of power is necessary for the prestige of the Indian Civil Service, or for the position of the magistrate as the representative of the *Raj*. In one aspect this argument is a repetition of the previous one, in so much as the I.C.S. was for many years purely a service for Europeans. In another aspect, it implies the necessity of the prestige of the visible local representative of the central governments, whatever the personnel of the representative. Normally these representatives are members of the Indian Civil Service, a Service which for a record of single-minded work for India and for its high Service standard of efficiency has been unequalled in the history of administration. The position of the district officer, according to this view, is that of a benevolent despot. In the older days this was undoubtedly so. The District Magistrate, who used to stay much longer in his district than the present day officials do, was known by sight and by name to practically every inhabitant of his district. I say "his" district, for districts were often known as "So-and-so's district." He was a real live entity. He dispensed justice (perhaps more justice than law) in his tours; he settled disputes of all kinds, and helped generally where help was needed. He was a combination really of the three powers, for he frequently made laws

of his own. These laws are not written in statute books; they were more the *a priori* assumptions of equity or commonsense and fair dealing. But all this has changed. The Collector-Magistrate is no longer the well known benevolent despot. He is a mere temporary phenomenon. Five years is the usual tenure of his office in one district, so that when he has really come to know his district and be known by the people, he goes to another district to repeat the process. The *personality* of the question has thus practically disappeared. The man has been replaced by the system; personal rule has given way to the rule of law, so that even the unlettered ryot no longer speaks of "So-and-so Sahib" but of the Magistrate or Collector Sahib. The prestige of the person, however, does not affect the prestige of the position; but the departure of the prestige of the person makes a transference of prestige from one office to another easier. Prestige, however, is no argument for the continuance of a system if that system is bad, or if that system has served its day and may now safely be replaced by a more logical system. Sir Harvey Adamson, in his statement on the subject of separation in 1908, remarked:—

"Can any Government be strong whose administration of justice is not entirely above suspicion? The answer must be in the negative. The combination of functions......is a direct

weakening of the prestige of the Executive. The fetish of prestige in the larger sense has been altogether discarded, and no longer forms an operative part of the policy of the Government of India."

The Hobhouse memorial also dealt severely with this "prestige." "For reasons which are easy to understand," it said, "it is not often put forward in public and authoritative statements. But it is common in the Anglo-Indian press, it finds its way into magazine articles written by retired officers, and in India it is believed, rightly or wrongly, to lie at the root of all the apologies for the present system." The memorial went on to show that the power of inflicting punishment was the main element in this prestige. The contention that the District Magistrate should have the power of inflicting punishment as the representative of the sovereign, it continued, "is based on a misapprehension. The power of inflicting punishment is, indeed, part of the attributes of sovereignty. But it is not, on that ground, any more necessary that the power should be exercised by a Collector-Magistrate, who is head of the police and the revenue system, than that it should be exercised by the sovereign in person. The same reasoning, if it were accepted, would require that the Viceroy should be invested with the powers of a Criminal Judge. But it is not suggested that the Viceroy's "prestige" is lower

than the "prestige" of a District Judge, because the Judge passes sentences upon guilty persons, and the Viceroy does not."

These statements, like many others in the memorial, provided excellent openings for the official jousters of the time. Sir Harvey Adamson said, and Lord Curzon agreed, that the faulty presentation of the memorial delayed the reform.

The death blow to "prestige" seems to have been dealt by Mr. Montagu, whose words at Cambridge, spoken in 1912, were quoted with effect by Sir Surendranath Banerji in the Imperial Legislative Council Budget Debate in 1913—

'Oh India! how much happier would have been your history if that word (prestige) had been left out of the English vocabulary.' But there you have Conservative Imperialism at its worst. We are not there, mark you, to repair evil, to amend injustice, to profit by experience. We must abide by our mistakes, continue to outrage popular opinion simply for the sake of being able to say 'I have said what I have said'......... We do not hold India by involving this well-mouthed word. We must uphold it by institutions, and more and more as time goes on by the consent of the governed."

(*c*) Apart from the question of prestige, why, it may be asked, if separation exists in practice,

should it continue in theory? The answer seems to be that although there is separation in practice, the theory allows, *if necessary* the full use of magisterial powers. Now this can be only for two purposes. One is that the magistrate may be prosecutor and judge, if he cares, the theory and practice of which equally have been disavowed by all responsible authorities, official and otherwise. The other is for the prevention of crime, possible at present under specific sections in the Code of Criminal Procedure. In the former case, the use of his powers by the magistrate would likely justify the most extreme language that separatists could use. Though objection has sometimes been raised to the preventive powers of the magistrate, the second purpose is really a question of public policy. It is a matter for the statesman to decide. If it is necessary for public reasons to grant such powers then such powers should be granted. The social composition of India being as it is, few responsible statesmen would propose to remove these powers from the magistrate or district officer: many indeed would like to see them increased. In any case, it would be possible by legislation so to define the preventive powers of the magistrate as to prevent oppression. For such a purpose I am heretic enough to support the system of administrative law, about which I shall have more to say presently.

(*d*) As an administrative question, it involves, as we have seen, the question of the training of the judiciary. In modern India, with its numerous and well trained bar, the old adventitious system of appointing judges and collectors interchangeably is out of date. In fact, the question of judicial appointments in many respects is the cause of the controversy. In the old days, when either a rough justice was necessary in criminal cases, or the codified law made judicial administration simple, the question of judicial training was not of prime importance. Early in the history of British administration it was recognised that civil, as distinct from criminal judicial work, required both special training and special conditions of service. In early days, too, the notion prevailed that in justice the normal British sense of equity was as valuable as training in legal codes. Even now judicial work in India is relatively simple owing to the elaborate codification of law; and even case-law is simplified by the ample Digests. But modern judicial work requires a considerable amount of specialised legal training. The first recognition of this by the Government was due to the rise of a trained bar. A trained bar makes an untrained judiciary an anomaly and a jest. No system of government should lay itself open to the charge of an inefficient judiciary, whether civil or criminal. The Courts are the guarantees

of rule by law, and both for the confidence of the people and the good of the administrative system they should be above suspicion.

In India an additional difficulty presented itself. The judicial work was done by specially recruited services. The miscellaneous duties of the chief service, the Indian Civil Service, gave only too easy a ground for the rising bar not only to cast aspersions on its lack of judicial training but also to bear a grudge against it on more personal grounds. In many other countries normally the bar looks upon the bench as a crown to its labours. In India, however, though junior appointments were granted to pleaders, the Indian Civil Service kept to itself all the "big jobs"—the District Judgeships and a large proportion of the High Court Judgeships. In the High Courts a certain proportion of appointments is open to the bar; but as these appointments are few, the bar still looks with longing eyes towards the district posts. The whole subject was brought up before the Public Service Commissions, the last of which, the Islington Commission, recommended that forty of the higher judicial appointments (for all-India) should be reserved for the bar. But the difficulty will continue so long as the present service system exists, and so long as the personnel of the Indian Civil Service continues to be in any way European. The difficulty really raises the whole

question of the suitability of the service system as it at present exists for judicial work. Whatever one's views on that subject may be, this at least seems clear, that the existing service system cannot be dropped in a day. For a young Civilian who is afterwards to be a judge unquestionably the best training is in executive work. By it he comes to know the social, political, economic and family circumstances of the people, as well as their point of view. His executive experience is the raw material on which his judicial work will rest. Combined with specialised training in law and procedure, it equips him well for work as a judge. This question, however, will in all probability soon solve itself, as in the near future the English element in the Judicial Civil Service will rapidly diminish, and, one may prophesy, will gradually disappear. The whole question of the district judiciary will then be changed, but one may predict that the future Indian Bar will have a stern struggle to uproot the vested interests of an Indian I. C. S. Even so, it must be remembered that no judicial system can be absolutely rid of some of the salient features of a service system. There must be higher and lower posts, with the higher exercising some control or supervision over the lower. Thus, in England there is a judicial hierarchy, which has been very largely accountable for the correction of mistakes

by the lower judiciary, and, incidentally, has preserved the judiciary from external attack.

Mr. P. C. Mitter really hits at the heart of the problem when he suggests a judicial service. Whether a judicial service on the lines of the present service system would be an improvement is doubtful; but Mr. Mitter's suggestion at least recognises that judicial work in a modern well organised government is a specialised function. It does more. The very word "service" suggests senior and junior, superior and subordinate positions, it suggests training, inspection, reports (administrative and personal), promotion and degradation. In this it recognises the absolute impossibility of getting rid of some of the reproaches cast at the existing system by its enemies. It is said that a District Magistrate can make or break a subordinate by his reports. If the subordinate officer does not 'convict' when the Magistrate is known as a 'convicting' magistrate, then that officer's future is marred. Or, it is said, a magistrate may not interfere in the course of criminal justice, but the officers *feel* his influence as all-pervading. They *know* that his favour counts for much, they *know* that their steps in promotion depend on his good opinion, whatever the official forms may say, or however remote his actual interference may be.

To transfer the function of supervision and report to a judge does not alter the position one whit. Judges are known as "hanging" or "lenient" judges; and if so their subordinates (not literally, of course) must be "hanging" or "lenient" judges. The judge may not interfere; he may seem to take no notice of cases except when brought before him on appeal. But all the time he may be noting in his mind or files the fact that So-and-so is an "acquitting" judge, because acquittals do not involve reversals of appeals or hard remarks. And, if there is a service system, there simply must be training, and therefore, supervision, which implies blame and praise. To receive such praise or blame from a judge does not make it substantially different from receiving it at the hands of the Magistrate-Collector.

And this must pervade the whole system, even to a Lord Chief Justice or a Lord Chancellor. Standards of judgment must be laid down, and in judicial work such standards are difficult to establish. One judge may 'work for returns'; another may acquit to avoid appeals; another may be severe, but his many convictions may mean many appeals; the judgments of another may be noted for their display of legal learning. The personality of the judge, his popularity, a thousand other

things may be taken into account. The fact is that finally a choice must be made when an appointment falls vacant. One judge will take one point of view; another may differ from him: ultimately the executive must do its best and appoint whom it considers the most suitable man.

For a service system this much may be said, that it reduces the likelihood of political appointments to a minimum. But the service system can only be successful if it is sufficiently elastic in its method of recruitment to give a fair chance to barristers and pleaders. A service system cannot secure the independence of a judge. Where he is amenable to conduct reports, where his pay is on a time-scale or a graded scale, where there is the regular routine of promotion, he must always act as if the eye of his superior were turned upon him. Personal idiosyncrasies, likes and dislikes, and personal whims must enter into the question of recommendation and promotion.

Presumably a good judge will give as fair a verdict in appraising the work of his subordinates as he would in a civil suit. To compel such verdicts to follow rules is open to the objections already mentioned. The only fair method would seem to be to balance personal judgments by the judgments of others; in other words, a bench should recommend names for

promotion to the executive government, which, though it has the final word, should show reason why it diverges from the opinion of its judicial advisers. This system, it is true, does not commonly exist, but a variant of it used to exist in Austria, where the nominations for the Reichsgericht were made by the Reichsrath to the Executive, which had to make appointments from the list given. In Belgium the Senate provides a list from which the executive must choose. The drawback to such systems is that, except where the practice has grown up for select and expert Committees of a legislative to choose lists, the judges are party candidates.

In connexion with judicial training in India much has been written on the difficulty of securing officers competent for both executive or judicial work. At one time it is stated that, under the combination system, an officer neglects his judicial at the expense of his executive work ; at another it is said that an officer neglects his executive at the expense of his judicial work. At one time complaints are made that able officials prefer judicial work : at another, that they prefer executive work. Some officials have claimed that the best minds are required for executive work, others have claimed the best for the high post of judge. As we have seen, the force of circumstances compelled the

Government to make a division of functions in the Civil Service, in the Regulation Provinces. Behind all these contentions and complaints lies the essential difference between executive and judicial work, and the force with which each type of work appeals to individual temperaments. Sir James Fitz James Stephen wrote—

"There is an obvious difference between the judicial and executive temper. A judge must go by strict rules. His work comes to him instead of his going to it. His duty is discharged where he has given a decision according to law, and he is unconcerned with its consequences in the particular case and with the process of carrying it into effect. An executive officer, on the other hand, must constantly look beyond rules. He must frequently have an eye rather to the particular cases than the general rule. He has to take the initiative in a thousand ways and for all sorts of objects. He has to watch the execution and carrying out of his measures, and their practical effect, and he is thrown into continual personal and informal intercourse with every class of the people."

The conditions of the judicial—fixed routine, office, court, etc.—also differ from the conditions (touring, inspecting, etc.) of the executive.

Sir James also expresses himself on the question of preference between executive and judicial duties as follows :—

...... "but to expect one man to carry on both functions at the same time appears to me unreasonable. It is not in human nature that he should not allow the one towards which he happens to be most strongly drawn to give the tone to the discharge of his duties in the other. I believe that this has actually happened in the Punjab to a very great extent, and that the legal element, especially amongst the younger officers, predominates over the executive."

The reasons he gave are these—that in executive work, much discretion is left to officers, and that there is no definite test as to whether an officer is doing good or bad work. Only time and experience can test his work. But with judicial work all this is reversed. Each judge has to keep an account of every minute of his time. Forms have to be filled in, cases decided, evidence taken, judgments given with reasons. He has to know the Codes of Civil and Criminal Procedure. Above him is the superior Court which may call for his records and definitely pronounce a verdict on his work. "The effect of all this is that a district officer, who has both executive and judicial functions to discharge, perceives, that his hope of promotion and his personal comfort alike require him to discharge

his judicial duties with entire exactness and punctuality, but that no such precise test is or can be applied to the discharge of his executive functions. Hence the executive functions were neglected for the more lucrative and comfortable judicial functions.

In the same year (1872) Sir George Campbell, Lieutenant-Governor of Bengal, complained that the best officials were required for the executive work in Bengal, and to secure this he initiated his well known scheme of parallel promotion. In 1896 Sir Charles Elliot showed that the judicial line had become unpopular because of a block in promotion.

To many officials the type of work is a matter of indifference: the things that matter are pay and prospects. Many men are Collectors only because they were not chosen as judges, who used to be better paid. Many men are judges who, had it not been for pay and the general conditions of the position, would have been Collectors. In a service system therefore, due regard must be paid not only to types of mind or temperament, but to the actual conditions of service. The executive officer has a reasonable ground for complaint if his brother officer of the same seniority gets more pay and has an easier life, because of his peculiarly judicial temperament and the necessities of an independent judiciary, or, on the other hand, if, because of his own peculiar abilities as

an executive officer, he has a more trying life, with less pay.[1]

(*e*) A further note to be made in connexion with the controversy is that in India the judicial powers exercised by District Magistrates have certainly served a good purpose. By no means the whole of Indian educated opinion,. since such an opinion has expressed itself, has been in favour of separation. A large number of responsible Indians even to-day gravely doubt

[1] The difficulties of the service system may be illustrated from the following conclusions of Sir Ashley Eden and Sir Charles Elliot, both Lieutenant-Governors of Bengal :—

In an official letter (of 1894) from the Government of Bengal to the Government of India, the following passage occurs:

"Looking at the results of the present system on the officers now in the service, Sir Charles Elliot believes that the disadvantages which Sir Ashley Eden perceived have gone on increasing and that the system cries for reform more loudly than it did in 1881. The failure may briefly be summarised as coming under the following heads:—(1) antagonism between the two branches of the service; (2) unequal promotion; (3) want of experience in the Judges. As to the first head, the Lieutenant Governor does not think that the feeling of separation occasioned by the system is a healthy one: it tends to divide the service into two camps and to destroy its *esprit de corps* as far as the judges are concerned it gives a bias to their minds and leads them to criticise executive action unfavourably, while in the case of magistrates it serves to encourage a mental attitude of opposition to judicial authority. In regard to the second head, the proper relations as to seniority and promotion are thrown out of gear. It is clearly desirable that a Judge should (if possible) always be senior to the Magistrate whose appeals he hears, and from the nature of the case this cannot always or even often be so under existing arrangements. He is frequently his junior, and, not only this, but it constantly happens that the same man acts as Judge in the hot weather, hearing appeals from a Magistrate who is his senior but in the cold weather he loses his acting appointment, and becomes a Joint Magistrate serving under the orders of the very Magistrate whom

the wisdom of reducing the control of the Magistrate in any way. Mofussal India is still as it was hundreds of years ago, save for a layer of educated men at the top. The difficulties which confronted magistrates one or two generations ago have not been eradicated. Public feeling on crime is not what it is in the West. False cases, bribery, offences of a kind peculiar to India, such as dacoity, unnecessary delays in trials—frequently the result of very questionable causes—all these are common to-day. One important change has taken place; that is in the efficiency of the subordinate magistracy. Wrong judgments, faulty procedure, prolonged trials in petty cases, unnecessary adjournments, timid sentences, or unnecessarily severe sentences, sometimes from

---

he may have censured or instructed in his official position. This cannot be good for the temper and discipline of the officers concerned. As to the third head, the rapidity of promotion in the Civil Service has created a new difficulty which practically counterbalances whatever benefits to the administration have arisen from the setting apart of a body of men for the work of the Bench. It is true that Judges continue longer in the Bench, and acquire, towards the end of their service, more judicial experience, but, on the other hand they take their seats on the Bench at an earlier age and before they can have obtained the requisite experience for their work. No early judicial training is possible, and a Civilian when first appointed a Judge has to learn the detail of civil work, without wide knowledge of the people and the mature experience which the older system entailed. Sir Ashley Eden considered that a man cannot be a good Judge without knowledge of settlement and Zemindari management, and to this Sir Charles Elliot would add that an officer cannot be a good judge until he has had considerable experience as a Magistrate. At present men are made Judges who have often had no experience as Magistrate of a district, and they are apt to set up an ideal standard of evidence, not knowing what are possible standards."

petty motives, used to be reported regularly of the subordinate magistracy. The one correcting influence was the Magistrate-Collector. These abuses have not disappeared, and nothing is more certain than that if the present system is abolished, an equally or more effective system will have to take its place, otherwise the terrible prophecies of a century of executive officials may only come too true. As it is, the power of law, the spirit of the work of generations and the width of appeal have prevented abuses in the present system.

No doubt unconsciously, the Hobhouse memorial paid a very high compliment to the existing system. As has been noted, with the memorial was a collection of twenty cases illustrative of the evil of union. Since then a few other cases have been added. Some of these cases are dubious examples of the principle they were chosen to illustrate. But even supposing all were true, it reflects no little credit on the Indian Civil Service that during the many years of the 'iniquitous' system which has so oppressed the people, only twenty or thirty cases can be quoted where abuse has resulted. In open cases of abuse, moreover, the officers received condign punishment from the Lieutenant-Governor. But where hundreds and thousands of cases are tried by these officials from year to year, and where the chance of abuse exists,

surely no higher compliment could be paid to any human service than that the enemies of the system can produce so few examples of abuse. Few systems of government could produce such a record. The "personal" government of the service system may well claim that the "personal" element has meant justice to the people. Whatever failings the much abused I.C.S. may have, certainly injustice or the misuse of its powers cannot justly be brought against it. In the few years that the British element in it have to run they will have free consciences if they live up to the standards of their predecessors. The Indian Civil Service may pardonably speak of "prestige," and part of its "prestige" has been to prepare India to dispense with the type of men who originally composed it.

One wonders how many "cases" of abuse could be brought against the Civil judicial system in India. These cases would not prove the union of powers to be correct; but they would help to balance the judgments of those who read or hear one side of the case.

(*f*) I have already noted that, especially in the early days of the controversy, exception was taken to the union of purely revenue and judicial powers. The objection appeared at various intervals and in various places in the controversy. But it never became a prominent issue. It was mentioned in the Hobhouse memorial :

it is mentioned in the short note on the general question by the Islington Commission. (This Commission did not pronounce any judgment on the merits of the case, as such was outside their terms of reference. It merely marshalled the arguments, for and against.) But for good reasons it was not made a leading issue. The land revenue is the chief source of income for the provincial governments. Its essential nature in the scheme of things is well indicated by the usual name of the District Magistrate—the *Collector*. The system of assessment varies from one part of India to another. In Bengal it is fairly easy owing to the permanent settlement. But in every case revenue collection requires special training and special machinery. The reasons for special revenue judicial administration are that only the revenue officials know the departmental business, and that it is their duty to enforce government rights in revenue matters. Moreover, it is always open for revenue payers to appeal to the civil courts against the decisions of revenue courts. The revenue courts themselves are conducted like ordinary courts, and that there is no need for a change may be proved by the records of the Board of Revenue, which show that in many cases the revenue courts have decided in favour of appellants.

The Board of Revenue, and the general administration of land revenue, are so constituted

as to be practically a self-contained judicial authority. All such agencies—*e.g.*, the Board of Inland Revenue in England—must have considerable powers of decision, with, at the same time, latitude in the right of appeal to the ordinary civil courts. Land revenue is so essential to the general scheme of government in India, that any *a priori* theory of separation which affects them requires the most careful consideration. The fundamental assumption of separationists in this case is that injustice is done to revenue payers. As a matter of fact, such injustice does not exist to any noticeable extent, if at all. But when we talk of the rights of the people we must also not forget the rights of government. Government is legally a corporate personality, liable to be sued by any subject. It must defend its own rights, and in all separationist theories of liberty, there is a tendency to speak of the independence of the judiciary. The other side of the question, the free working of the executive, is not mentioned. Revenue Courts are a case in point. Revenue must be collected regularly, and, of course, equitably. But to place the revenue authorities in the hands of courts, which might have a permanent bias against the government, would not only introduce delay and confusion in revenue administration, but would obstruct the whole business of government. Not only so,

but such courts would have to be specialised courts. Some sort of revenue appellate authority would be required in each district, so that not only would the cost be enormous, but it would be wasteful. For the present smooth working machinery it would introduce obstruction and delay. It would upset the administration.

It may be noted that Mr. Dutt, who had a long revenue experience, did not include this aspect of the question in his scheme. Nor did the memorialists, conveniently enough perhaps, suggest any alternative to the present scheme. Perhaps those behind the memorial were aware of the difficulties of separation, an index of which is the enormous number of appeals which the Civil Courts have to hear after the periodical settlements. These appeals usually require an officer on special duty for several months.

The subject of Revenue Courts raises a much wider question. Revenue Courts are partly in the nature of the administrative courts of continental Europe. They are presided over by government officials, and government in practice reserves certain subjects for them. The law and procedure of the courts are prescribed by statute; actual trial is not, as in the continental courts, inquisitorial, but normal, like those of a civil court. The chief difference is that the judges are executive officials. Appeal also lies from the

revenue courts to the civil courts and, in cases, to the High Courts.

At present, legally speaking, the Government of India is a unit. It is a corporate body, which may sue or be sued. This characteristic is explained by its origin. The present Government of India is the lineal descendant of a commercial company. In the days of the Company actions against the Company's servants were actions against the Company, and they were heard in the ordinary courts of law. When the Company became the Crown, the Secretary of State in Council assumed the corporate character of the Company. Thus the Indian citizen enjoys the guarantee of the law courts against illegal action by the Government. The administration, moreover, cannot act without prior legislative sanction for its acts, otherwise the acts may be tested in the law courts. The government, as Sir John Strachey pointed out, is amenable to law as well as the subjects. Hitherto the executive control of the legislature has enabled the executive to have laws passed to suit administrative expediency. But the principle of the rule of law has been technically observed. Another important feature of the administrative system which prevents arbitrariness must be noted. It has been the habit of the executive government to restrict by a large body of administrative rules the latitude granted

by law to the administration. Every official, whatever his work or his Department, is only too well aware of these rules. They are more effective than the general Acts of the legislature. The highest and lowest officials are bound by them. There are, too, the traditions of services or the customs of administration which bind officials to certain rules. No one has put this more plainly than one who himself was both subject to and made these rules,—Sir John Strachey. Speaking of the post he himself held, he said—"The checks against the wrongful exercise by the Lieutenant-Governor of arbitrary powers, are complete. There is no branch of the administration in which he is not bound either by positive law or by the standing orders of government or by the system which has gradually grown up under his predecessors." This is even more true of district officials, for not only have they definite laws and administrative rules, but they are actually subject to supervision and correction.

The question arises whether in India, with its many official hierarchies, the continental system would not be more beneficial than the present system. To my mind one of the most extraordinary features of British administration in India has been the easy transference of English legal principles and constitutional practice to a land where the contrasts between it and England are so notable. Not only in the racial and mental

characteristics of the people is the contrast notable, but their whole social and economic composition is different. The mixed nature of the population, and the peculiar composition of the government make the actual problems of government unique. Apart from the personal element in government work, government, in laws, regulations and institutions, meets the people at every turn of their lives. The Governments of India are the most socialistic in the world, yet hitherto they have been content to carry on with the legal and administrative maxims which have been applicable to an individualist type of government and to a more or less homogeneous population. In spite of their alien composition, hitherto the personal and legal relations of the government services have been wonderfully free from untoward incidents or cases. Such cases, of course, do occur, but the infrequency of their occurrence is remarkable. Now we are in a transition period. In the next few years the government administrative services will rapidly, and almost completely, pass into Indian hands. It behoves us therefore to cast round for a means of guaranteeing rights, both of the people and of the government, among a people and for a government whose traditional moral outlook is different from that of its past administrators.

One of the most notable differences between India and England is the general attitude

adopted towards government by the people. In England normally individual initiative is the motive force in the ordinary civic and economic life of the community. In India government is the 'father and mother.' Individual initiative is woefully lacking. Government is looked on as not only all-powerful but as a benevolent father. It must, through its servants, encourage, drive, advise, or actually do things itself—usually the last. Thus, in India, a vast amount of activity which in other countries is conducted by private agency is done by government. This means government institutions and government services. For the efficiency of the work as work, and for its effectiveness among the people two things are necessary. On the one side there must be latitude for personal or individual action, without undue extrinsic interference. On the other side there must be guarantees against the arbitrary use of departmental powers conferred by government, or the abuse of power as a government servant on the part of administrators, for government service in itself confers a prestige or *izzat* which may lead to abuse. In a future India, which has forgotten its racial animosity towards the alien Europeans, the government services will be manned by a personnel which will inevitably clash with existing social, religious and economic interests. Hindus will have troubles arising from caste; both

Hindus and Moslems will have troubles arising from religion; Punjabis will have troubles with Bengalis, and so on. All will have troubles incidental to their family lives and social connexions. The tendency of the people to proceedings in the Courts—either on true or false cases—will also make the official life somewhat neurotic. And officials must be prevented from using their powers detrimentally to the people. In the feverish nationalism of to-day these things tend to be overlooked; but every administrator, as distinct from a politician, is only too painfully aware of their possibilities.

Hitherto the administration has been governed by the Rule of Law. The Rule of Law is characteristically English. Is it politic or fair to leave India with a British spirit of administration when the British connexion is gone? To say the least, a constitutionalist must regard it as dangerous to give the rather vague Rule of Law as the chief guarantee of rights to an administration and a people to whom the Rule of Law is relatively new and not assimilated by the masses. The traditional English method of acting first and thinking afterwards may suit England. One may very justly question if it will suit India, which, as I have said, is almost the opposite of England in most respects.

To my mind the solution to these difficulties lies in the system of administrative law. To

many English and American constitutionalists this is heresy. To continental constitutionalists it is a necessary part of the government. Even in England the growing officialism in government has been accompanied by a tendency to adopt administrative law, at least in some respects. In all countries, England and the United States included, administrative execution is adopted for the collection of taxes, *e.g.*, in the case of non-payment the administration may seize property without judicial interference. Such executive action has legislative sanction, of course, but as Professor Dicey has pointed out, the transfer of authority to administrative boards saps at the foundation of the Rule of Law. The English courts keep officials within the law, *i.e.*, in cases of abuse officials are subject to the jurisdiction of the courts, but all errors of judgment, misinterpretation of orders and such like do not come within the purview of the courts (save, in certain respects, the courts of Quarter Sessions which, so far, have taken to themselves a characteristic of the continental system). In the English system, particularly by the writs of *habeas corpus*, *mandamus*, *quo warranto*, and *certiorari*, abuse is corrected, but the modern tendency to give functions to expert bodies of boards lessens the likelihood of the courts interfering. In fact their interference in all probability would not be welcomed by

the ordinary citizen, as it would add to the duration of cases, and the most decisive evidence would be heard from the officials who administered the particular subject.

Since the War, officialism in England has become more and more pronounced, partly owing to Mr. Lloyd George's method of choosing experts during the War as the heads of the various executive departments. It saves time and trouble to give wide powers to these experts. Such power is equivalent to delegation of authority, and is perfectly legal and in accordance with the English spirit, but it sets up an *imperium in imperio*. Each board sets up its own executive and its own judiciary which, by law, are empowered to execute their duties. For the execution of their duties the normal processes of law are not introduced, in fact the reason for the being of such boards is to avoid such processes, with their delays and legal technicalities.

In America, too, with its English system, a similar process is going on. The legislature is tending to extend to administrative boards or experts large powers of execution, and the courts support the legislature. Courts as a rule are jealous of the executive; they do not like to see their functions usurped. In recent years, however, there has been a distinct tendency—a tendency which has annoyed the arch-constitutionalist

Professor Dicey—to give up the jurisdiction of the courts in administrative questions to departmental decision. But the most notable instances of its adoption are in Japan and recently, in Germany. In Japan the system was adopted by the Commission on the Constitution after an exhaustive examination of all other systems. But the most remarkable adoption of all is in the recent German constitution.[1] Here was a Constituent Assembly of a Social Democratic type, which drew up a constitution which was designed perpetually to destroy autocracy. The new German democrats have actually accepted administrative law as an instrument of liberty.

In India the Rule of Law is doubtless a great blessing to the country; but the Rule of Law is already tempered by a certain amount of administrative law, due to the centralisation of government. Indeed centralisation is one of the characteristics of the continental system, and it certainly exists ready-made in India. But, as noted above, Revenue Courts are partly administrative, and within the administration itself there is much of the nature of administrative law, especially in appeals. The Decentralisation Commission (in Chapters IX and XVII of its

[1] For a fuller analysis of the new German Constitution, see article, "The New German Constitution" in the Calcutta Review, October, 1920.

Report) dealt with this question. It says—" It is desirable to strengthen the hands of government officers, and to economise the time of their superiors by giving greater finality to their decisions, while the fact that members of the public have greater freedom than officials in the matter of suing the government in the courts, renders it less necessary to provide a series of administrative appeals for their protection. On the other hand, it is better that executive officers should be able to correct errors of their subordinates through such appeals than that verdicts should be given against government in the courts."

In India the control by the judiciary of the executive has not been marked. But in India, as in England, the spread of officialism, the rise of new departments, and the very basis of the whole administration call for the creation of courts which will abolish the antagonism between the executive and judicial, and, at the same time place such courts as the Revenue Courts on a proper juristic footing. One of the complaints constantly voiced against the judicial or quasi-judicial functions of Magistrate-Collectors, or the executive generally—whatever the country—is that they become secret, and arbitrary. With modern differentiation of functions and specialisation, and with the devolution of powers to departments, each of which will be a miniature

imperium in imperio, there seems to be an unanswerable case for an institution which represents the middle way between complete separation and complete union. As I have shown, the alleged interference with the judiciary by the executive has given rise to much ill feeling in India. But the other side must not be forgotten. —the interference by the judiciary with the executive. Executive action must be prompt, decisive, effective. Fettered by fears of writs (even Professor Dicey admits that *habeas corpus* has at times somewhat upset executive action), or the legalistic formulæ and delays of courts, an executive cannot be effective. The rights of the citizen, too, must be guarded against executive abuse. At present, the English system says, he must go to the law courts. Law courts deal with law: whereas executive work implies acts, facts and policy. Policy is outside the range of the law courts.

Administrative courts, the home of which is France, deal with disputes between executive officers among themselves and between them and the public. Not only are they guarantees of good administration according to the law, but they are guarantees to the citizen against officials. Professor Dicey, whose well known chapter on the *droit administratif* has prejudiced so many Englishmen against the system, has argued that these courts have a bias in favour

of the official. This is natural, if the courts are composed, as they are in France, in such a way that the will of the executive must prevail. But in Prussia (and may I note again the system has been continued in the most democratic constitution of modern times?) the judges are irremovable. In France the members of the Council of State (the highest administrative Court) may be removed at any time by the executive. One of the chief virtues of administrative courts is that they are composed largely of administrators. The expert knowledge, quickness of action, the absence of undue legal technicalities and procedure are thus at hand in the courts as dispensers of justice at the same time as aids to good administration.

But I am not concerned with the actual organisation of these courts. Suffice it to say that in India we may profit by the mistakes of others. Whether the courts should be composed half of judges or half of active administrators, or any other proportion is a matter for detailed analysis not necessary here. I believe that in these courts—paradoxical though it may appear—lies the future safety of the English Rule of Law. Whether it be in England herself, America, or India, officialism must be saved from itself and the citizens must be saved from officialism. At the same time there must be efficiency in the public services.

The history of the Indian magistracy represents an epitome of the history of western administration. In the short space of a century and a half, India has compressed into her history the scope of several centuries in western evolution. The process from the simple to the complex was a long and laborious one in England. Nor was it a continuous process. Gradually, in spite of its ups and downs, it evolved from absolutism to democracy, from centralisation to decentralisation, from unification to differentiation. Many of the old absolutist forms remain though the spirit has changed. The theory of the constitution is also in many cases markedly opposed to its practice. Theoretically there is complete union of functions, the legacy of the old days of absolutism. The king is the head of the legislative system; he is the nominal executive; he is the fountain of Justice. Actually he is a figure-head. The Cabinet, the head of the executive, is responsible to the House of Commons. The Judiciary is independent. This constitution, in which union is so markedly present, was actually the model of Montesquieu to whom the Theory of Separation owes its modern vogue as an instrument of liberty. In France, under Louis XIV, the state was the king. The king was lawmaker, executor of the laws, and, though actually the courts were well organised, the final tribunal.

The early English administrators—to whom, be it marked, administration was ancillary to commerce—combined functions in a haphazard way. Their test was not legal forms, but actual success. Gradually, as the hold of administration was fixed, arose definite theories of government, with the accepted western maxims. Courts were established; the executive was organised. Gradually to mere government was added development. The need for development led to specialisation of functions. The visible ruler, the district Magistrate-Collector was gradually divested of many functions which passed into the hands of departments, or special branches of government. Civil justice, police administration, public works, forests, jails, education, sanitation, local government, one by one departed from his control, leaving him a consultant and reporter, or a post office. New duties came where old duties went, and in the course of time, some of these new duties, such as co-operative credit, left him for departments. Two duties, with their powers, have continued, revenue collection and criminal justice. The time seems ripe for a further division, for it has now been accepted that by no theory of government can we reconcile the responsibility of the executive to the patriarchal combination of powers. Administrative expedience may be an excellent, it may be the

best plea for union, but granted, as it has been granted, that India is fit for responsibility, then she must also be fit for the separation of the judicial and the executive.

During the last few years the administration of India has undergone many strange experiences. In 1915 we received a report by the Public Services Commission on the Public Services in India. In 1919 came the monumental Report of the Calcutta University Commission. The basis of both was imperilled by the momentous announcement of August, 1917, in the House of Commons regarding responsible ogvernment. What was logically prior came last, making the recommendations of the others either inapplicable or placing them in a false position. The Public Services Commission, for example, might have spent its time much more profitably analysing the whole system of government, an analysis which was beyond its terms of reference. In the meantime the executive work has to be carried on by the government in India by services which are none too sure of their future. India is now on the high way to full responsible government, but there is still much groping in the dark. A more systematic and scientific statement of policy, more co-ordination, and a longer view would save an infinite deal of trouble. Under the old scheme of things, the provincial governments

used to think administratively, the Government of India politically, the Secretary of State rapidly. In India the government as a whole was earning the unique, if unenviable, reputation of being expert in the act of governing backwards.

To sum up, modern theory demands the separation of the present executive and judicial functions, though past experience does not show the presence of abuses which necessitate such "reform." The question is not an urgent one, and the *salus rei publicae* would not be adversely affected were the present position to remain. Public money could more advantageously be spent on other and more pressing reforms, unless it can be proved that the people as a whole would receive more mental and physical benefit from the satisfaction of a logical principle. There is something to be said for both sides; but one thing is clear, that some more definite and lasting system for the administration of India needs to be formulated. Haphazard methods may be carried to extremes; and one line of reform, which in the writer's view seems worthy of very careful consideration, is the possibility of adapting the system of Administrative Law to India.

APPENDIX A.

Extracts from Mr. Reckitts's Letter.

(*Vide p. 14.*)

It will then be shown that the duties are nfinite which have no bearing at all on judicial training, however much they may tend to mature an Administrator's experience, and draw forth all his power. On the other hand, it will appear that there must be a great and constant exercise of judicial functions in what are the most legitimate and important of a Revenue Officer's duties that there can be no politic separation of these duties; indeed that their combination is inevitable under our Revenue system.

But it must throughout be admitted that the anomaly complained of in the despatch does to some extent exist. Perhaps it may be possible to suggest some modifications or changes in the service, which, whilst, doing away with this anomaly, might benefit the administration and still I believe be in accordance with the general interests and opinions of the service.

It must be observed here, though it should have been observed earlier, that the official designations applied to our Executive Administrative

officers—Collectors and Deputy Commissioners—convey but a very imperfect idea of these officers' duties and responsibilities, and not only is the truth suppressed, but there is a suggestion of a false comparison with the similarly termed official in England, the "Collector" of a water rate, for instance, or the "Collector" of a tax assessed on your horse, your dog, or your crest on your groom's buttons—and the duties being accepted as somewhat similar, the responsibilities and faculties required for their discharge are held to be equal.

This want of accurate information is often encountered by Indian officials in England, even amongst persons who should be, or profess to be, well informed on Indian matters and official duties. It is no wonder the inappropriate term misleads. The mistake lies with those maintaining the erroneous appellations, rather than with those who naturally accept the title as descriptive of the duties and take for granted that it would be changed if it was incorrect or incomplete.

I hope the term suggested by the Secretary of State's Despatch may be accepted as a new official denomination for the misunderstood Collector, or Deputy Commissioner—which latter term to my mind requires still more explanation than the former. The term "officer of a district" or "administrative officer of a

district" would be a far more accurate and descriptive title, more comprehensible and more intelligible.

The position of this official is this. He serves as an Assistant for 10 or 12 years, then till his 15th or 20th year of service he is a Magistrate, as well as a general executive administrator over a district comprising from 2,500 to 6,000 square miles, and over a population varying from 600,000 to 1,400,000 souls. The district will contain probably one town of from 40,000 to 120,000 inhabitants, six or seven minor towns under 8,000. There will be about 500 miles of roads in the district, and the staff will consist of 3 or 4 Assistants, 8 or 9 Native Sub-Collectors of Revenue, and co-subordinate Native staff of about 250 persons. The amount of Government revenue will vary from 5 to 20 lakhs of rupees a year. The population will comprise from 6 to 15 perfectly distinct races and castes, who have nothing in common, and often are antagonistic to each other.

As a Magistrate over this heterogeneous mass, he will have the supervision of about 40 police stations and 500 police under an English Officer. During each year he and his staff will, in a large district, dispose of about 2,000 criminal charges, rendering necessary the examination of about 10,000 persons. In exceptional years, as when famine is impending for instance,

this number will be increased by one half at least. Every case is recorded in English. Probably during the Magistrate's long apprenticeship of 15 or 20 years, there is not one criminal class with whose habits he is not intimately acquainted, there is hardly one clause in the criminal laws which he has not enforced. His commitments, excepting a very small fraction, will have obtained convictions at the Sessions. He will all along have worked under the strictest supervision of the superior Courts, who will have detected and called for explanation of the smallest irregularity. In Sessions cases he has attended the superior Court as prosecutor on the part of Government, each committing officer conducting his own case. The cases must be quite exceptional when an officer, who has qualified as above related, is not thoroughly qualified, to discharge all the duties of a Criminal Judge, when his time for promotion comes.

But a Magistrate's miscellaneous duties are infinite. He is a Justice of the Peace, an important office in your large cities, amongst our largely increasing English population. The wandering houseless outcasts from this population will soon require lock-ups and workhouses for their accommodation, exceptional legislation for those poor people is inevitable, and their care will fall on the Magistrate. He is the officer appointed by the Government to protect the

interests of the public in all connected with the Railway management. He has to report every accident where carelessness is apparent, or life is endangered. He is the health officer, not of the head-quarters station and city only, but of the whole district. Should there be an outbreak of any epidemic, as cholera for instance, he has to make a cordon round the stricken ward or round the city to protect it. By him is medicine distributed throughout his police stations, whence it is accessible to the people. By him are quarantine camps formed for isolating stricken or suspected travellers. The Government Vaccinating Officer, previous to commencing operations for the season, consults with and acts under the assistance of the Magistrate.

The Magistrate is a member of the Cantonment Military Committee. His voice is heard in all connected with the mutual interests of the Civil and Military community. His opinion is taken if Cantonments are increased or altered. The Lock Hospital reforms depend entirely on his co-operation.

In the station and city the Magistrate is the person responsible for the drainage, conservancy and all sanitary measures. He is the projector of all new streets and improvements. He makes, mends and waters the roads. He is the Local Board of Works and the Local Engineer. Should there be a Municipal Board at this

head-quarters, he is their active member, their Executive Officer, the accountant and treasurer, and he has to drive the whole cumbrous machine along, at the best deriving but little assistance from them, and often at a great sacrifice of time and labour. He is the person in charge of all the station rides and drives, the race course, so called, but in truth the station park, the public gardens, and all places of public resort and amusement.

The enumeration of even a portion of his duties is not yet complete. Next to the Civil Surgeon he is the chief person in supervision and management of all civil and charitable hospitals and dispensaries in his district. He is a visitor, and to some extent responsible for the jail of his district, and in head-quarter stations there is the Central Jail besides, over which his supervision and responsibility to some extent reaches.

In the interior of his district, the Magistrate has the superintendence of all roads; these will average 500 miles in each district; he is the Executive Engineer for all these lines and whatever bridges or embankments they may require. He surveys and lays out new ones when requisite. He has charge of all the tolls and ferries. Should his district contain sacred shrines, the resort of Native pilgrims, he has the entire charge of the Native fair assembled,

and lasting for weeks at the sacred spot. This is a most serious addition to his duties, it means the laying out the camp for from 100,000 to 500,000 people from all parts of India, and every sanitary arrangement for them, and the protection of their lives and property through the Police.

These are some of the miscellaneous duties expected from a Magistrate. As a fact by some few they are all fairly done, by some they are as well done as can be expected under the circumstances. It often happens that a really good Magistrate does not excel in all those miscellaneous duties, and the reverse is often the case. But few men can by nature be sufficiently pliant, adaptable and versatile to give satisfaction on every point. No doubt these many calls on his time distract him much from his legitimate duties. Inasmuch as his attention is distracted, and his time diverted from these legitimate duties, by so much does he lose the Judicial training required to make him an efficient Judge. As a fact, in all large stations the actual case work, which supply the training, has to be set aside by the Magistrate to be performed by his subordinates, his Judicial training nearly ceases when he is promoted to be a Magistrate. He cannot though make over these miscellaneous duties to others, for he is personally responsible for all.

It has long been a matter of surprise to me why a highly paid official of some rank and standing, and in a most responsible post, should be permitted thus to be over-burdened with petty duties, and his time grievously wasted in doing what could be equally well done by a much cheaper agency.

I doubt if the Government is quite aware of the present state of things, for it has grown by very slow degrees. The habit for years has been to throw everything as it comes on the Magistrate or the Collector. There must be much good evidence produced before Government ere it can be convinced that too many straws have been heaped on the camel's back, ere a radical change can be made.

The correspondence from home shows that the suspicion has arisen, from whatever cause, that in India the Judicial training is incomplete. From an Indian point of view, I believe I have partly shown one cause at least. It is the interest of Government to get as much good work as it can for its money; it should not pay a high salary to a Magistrate, and then connive at his being overwhelmed with extraneous duties. It is impolitic, illogical, and extravagant, it is unjust to the Magistrate himself.

In the case of the Magistrate, the remedy is easy. Let him have more paid assistance. In all large cities and head-quarter stations of

a Civil Division, let there be a paid city and station Magistrate, to take all duties within a certain circle. This would be mere justice to the people, and to the unlucky Magistrate, and Government would gain more valuable work in nearer proportion to the salary it pays, and in course of time it will have a better trained candidate for a Judgeship.

But the greater portion of an Administrative Officer's duties remain to be described. The Collector's are more onerous and more difficult than a Magistrate's. The legitimate duties of a Collector are related in the old Regulations XL of 1793 and XXV of 1803. They are legally defined in 13 to 24 different headings. The subjects under one or two of these headings are obsolete, one or two refer to office details, the remainder sketch in a few words our whole Revenue system, but it will appear only to the initiated how many strictly judicial duties they involve.

To be brief on this point, it will suffice to say that whenever the term "settlement" of States is used or "divisions" of estates, or investigations of the claims of Government, or others to any rights in land or revenue, or rent, it must be understood to mean a judicial enquiry, often of the most difficult and complicated nature, into every description of proprietary right in land, or tenant's right of occupation.

For each there will be many claimants, their rights will be very nearly balanced. Any Collector or Settlement Officer especially exercises in hundreds and hundreds of cases the most pure judicial functions. The base of his proceedings is the broad foundation of our revenue system. He actually decides the proprietary right in every acre of land in his district, he settles every tenant's position, he frames a record of every one of these titles, he assigns to each his quota of revenue or of rent. This record is implicitly accepted by the Civil Court as a genuine title deed. Probably a Settlement Officer occupied in settling an ordinary district will finally adjust 300,000 or 500,000 such titles.

Here is certainly the best possible judicial training. Indeed it is a training without which Revenue Law cannot be justly administered, for it must be remembered that our Revenue Law is based on "Custom." No law framed on such a foundation, ruling such immense interests over such an expanse of territory, can be as precise, complete, and definite in its terms as any Act or Law applying to one limited subject only, as for instance, a law on debts, or mortgages or bankruptcy.

The Revenue Law is not so much between one subject and another as between the governing power and the subject people. To be well administered, it must be interpreted by the light

of a wide revenue experience—or, as we have often seen, it is misinterpreted. It is over-strained, and its actual purport contradicted. An interpolation is made quite innocently as an explanation, the interpolation becomes law, and a whole section of every village community is placed in a position which the actual law as framed by experienced Revenue Officers, never contemplated, and which, in fact, its precise wording was meant to avoid, or a decision is given which saps every tenant's right at a blow, whilst at the same time it ruins every landed proprietor's prospects of weathering a famine season. I am not suggesting difficulties. Precedents can be cited, bearing out every word I have above stated.

On this point I think nothing could be more fatal to the relations of Government to its subjects, as supreme landlord and tenant, more prejudicial to our revenue system, more injurious to the prospects of the landed proprietors throughout all India, who are our main support, politically and materially, than a separation of the Judicial and Administrative lines without permitting the former to be recruited from the ripe experience of the latter, who I submit, though administrators, alone have had the right judicial training to ensure a correct exposition of all laws connected with land, revenue, and rent.

Next in importance is the trial of suits for rent, under the Rent Laws. These cases are counted by hundreds in every district. They are all distinctly Civil Suits. The mode of procedure is the same as in the regular Civil Courts. Many of these suits are very complicated. They have all the features of a suit for debt or loan, accounts, notes-of-hand, partial adjustments, interest, written agreements, all claim the attention of the Courts, as much as the peculiar claims and titles between landlord and tenant.

Appeals lie from these orders to the Judge as well as to the Collector. In my experience, the Revenue Officers of all grades decide these cases with as much care having as much regard to fixing the issue,' omitting extraneous matter, and following the ordinary civil procedure accurately and intelligently as any of the purely Civil Subordinate Judges.

Similarly in all cases requiring the partition of estates. Titles and claims of all kinds come under review "judicially." In claims for exemption from the payment of land revenue, which were more common formerly than now, but which have been decided by the hundred in our recently acquired provinces, the most complicated title deeds have, or have had their validity tested by the Collector, acting in a judicial capacity.

Again, in all suits to which Government is a party, the Collector is charged with the preparation of the case on the part of Government. These cases are numerous and various. It would appear anomalous to entrust this duty to an Administrative Officer, were it not known that he has some judicial experience. No doubt they should be entrusted to the Government Solicitor and Advocate, but there is no such official out of the Presidency capitals. These cases proceed from the Collector to the Secretary of the Revenue Board who is *ex-officio* the Legal Remembrancer! He has the handling of the case until it goes into Court. It is a strange practice no doubt, but it stands the test of success. The duty of preparing these suits, original and in appeal, is good practical training for a future Judicial Officer.

Further instances could be cited, but the above is enough for my purpose. If the separation of the service into two departments is recommended only on the belief that the Collector or Administrative Officer does not discharge any judicial functions, and has no judicial training, I believe I have shown that the supposition is based on an erroneous impression of a Collector's duties.

But it is not my wish to prove that the Administrative Officer receives a complete judicial training. I merely wish it to be understood

that it goes further than is generally supposed—and that, as far as it goes, it is good.

It is easy to show how it might be made much better, for here again, as it was with the Magistrates, so it is even to a greater degree with the Collector. A mass of miscellaneous work is heaped upon him, diverting his time and attention from his important legitimate duties. Certainly administrative reform is much needed to remedy this, to enable the highly paid responsible officer to devote his time to his proper duties, to allow the State to receive in its own interest the full value of its servant's power and experience whilst he is a Collector, to train him up so as to become in time a reliable Judicial Officer. The interests of the State and its servants are in fact identical on this point, though they are often lost sight of to their mutual detriment, and with great injustice to the servant of Government, who humbly accepts all that is imposed on him, to the injury of his present position and his future prospects.

I will relate as briefly as I can some of a Collector's duties. It will be easy to distinguish the proper from the miscellaneous class. He is the Superintendent of Excise. In this capacity he has to form the privilege to manufacture spirits and drugs, to supervise their sale, and to guard against illicit traffic.

He is the responsible Treasury Officer. He has charge of the Money Order Office! a petty duty discharged at home by some small shop or Post Office-keeper. He is the Government Agent in all transactions connected with the Paper Currency. He has to maintain separate accounts in all these departments, and he is held responsible for all. These new departments, though supervised by a separate agency and actually worked by the Collector, to quote an official phrase, "in addition to his regular duties without any increase to his salary."

If a canal is projected through any portion of a country, the Collector is the person who recommends the course it should take, he assists during its construction, he imposes the Revenue accruing from it. He alone encourages and extends irrigation by wells, giving all the advances, taking all securities, and being answerable for their construction, and that the advances are refunded. This duty alone should be entrusted to a separate department. Because it is optional with a Collector to undertake it, as a fact it is neglected for more pressing, but less important matters, and so this great safeguard against famine, source of Revenue to the Government, and benefit to the people, is almost entirely neglected.

Should there be any demand for Military carriage, the Collector has to supply it. He

provides provisions along all his roads for the use of marching troops. He has alike to supply eggs for the Commanding Officer's breakfast, and corn and grass for the troopers' horses. If the encamping ground is ill defined, the Collector has to erect and maintain the boundary pillars. If it is stained and defiled by travellers, the Collector is reported to Government, and is expected to have it cleaned, and to purify it by ploughing and cropping. He plants the trees for the shade of the camps, he maintains the wells. If a soldier dies in camp, he is buried in the quiet corner preserved for his last resting place by the Collector of the district. When troops are ordered on service, the Collector is not surprised at being officially requested to furnish private servants for the officers, cooks for the men, grooms for the horses, sword-sharpeners, tin-men, smiths, saddlers and adepts at all the handicrafts required by men on service. As a fact, the Collector supplies them all.

If the Civil Station is on the bank of one of the large streams running from the mountain forests to the plains, the District Officer is the Government Timber Agent. In a jungly country he is the killer of wild beasts, reporting the slain to Government. Should his district be denuded of trees, or should his roads be shadeless, an exacting Government expects the Collector zealously to superintend arboriculture in all

its branches in groves and avenues. Should he be in a horse-breeding country, he has charge of the Government stallions, and is answerable that they are made use of, or, under the orders of Government, he distributes bulls from the Government farms through the cattle-breeding tracts.

If there is any new experiment to be tried in agriculture, as for instance, the cultivation of exotic cotton, the Collector imports the seed, distributes it, issues instructions for its culture, watches its growth, and furnishes biennial reports on the area under cultivation, and the expected outturn for the benefit of the private grower, the Indian and the Manchester trader.

When land is required for a new station, or for a railway or canal, the Collector conducts and concludes the whole transaction from beginning to end. He calculates the cost of houses, trees, crops, and land, settles all conflicting opinions, and makes the final legal agreement; this is one of the heaviest of some District Officer's duties.

He furnishes all statistics, agricultural, sanitary, mortuary. He is the visitor and local guardian over all village schools. He superintends the education in arithmetic and mensuration of all his village accountants. Indeed, he should be able to survey, level and plan like any professional surveyor for in no other way can he

at times settle an obstinately contested boundary. He is one of the Board of Examiners of the Junior Members of the Service of the candidates for pleaderships in the Civil Courts, and of Officers of the Army entering the Staff Corps.

If money is scarce, and local improvements languish, the resource of the Provincial Governor is the imposition of an octroi tax. The Collector has to draw out the schedules of articles and rates of taxation, he establishes the cordon of posts, appoints the Inspectors and Collectors, and manages the whole. He conducts the endless correspondence resulting from the measure, and as far as he is able, he impresses on the tax-paying multitude the advantages of the unpopular impost.

The periodical census is another duty entrusted entirely to the District Officer. He organizes the whole machinery, tabulates all information, and describes in his report every tribe and caste in his district, their origin, occupations, and peculiarities. In fact his census report is a page in Indian history and progress.

The Collector is the guardian, under the Court of Wards, of every minor landed proprietor in his district. He pensions his father's widows and followers, dismisses all his parasites, provides for the Ward's education, farms all his estates, being the agent for the whole property even to its most minute details. He arranges for the

Ward's state according to his rank, age, and degree. When the time comes, he negotiates for him a suitable marriage. He continues this multifarious charge until relieved by the Ward's majority.

Similarly when it is the interest of the State to avert ruin from an influential deserving family embarrassed by misfortune or thoughtless extravagance, the Collector, instructed by a paternal Government, steps into the breach. He takes charge of the estate, cuts down all superfluities, adjusts all creditors' claims, pays the proprietor a fixed stipend, and continues these onerous duties until all embarrassments vanish.

The list is not nearly complete. The whole travelling public is under the District Officer's care. For them he has serais, wells, rest-houses, and provision-dealers. Every halting place is under his especial protection.

Orders are received from the Home Government that photographs of ancient buildings or objects of interest are desirable. The Indian Government directs the Collector to obtain them. This is no easy task, as he is expected to obtain them for nothing.

If a parcel of Savants interested in Ethnology require subjects for inspection and discussion, the District Officer is at once applied to, and he submits for their edification, and in the cause of science what he conceives to be the

representative men of every genuine tribe and race in his district. The Lieutenant-Governor of a province happens to be impressed with the advantages of an industrial and agricultural exhibition. Forthwith the District Officer composes and issues the prospectus. He is the gathering and electing Committee in every department. He furnishes the design for the structure, finds the material and the workmen, superintends the erection of the buildings, and fills the stalls and sheds with commodities and cattle ransacked from 12 or 14 districts; he organizes the Juries and on the appointed day, hands over the show complete to the Lieutenant-Governor and the public. Finally, he distributes the prizes, and reports the whole to his Government.

Is there to be any Law reform, the Collector is the practical man whose opinion is furnished to blend with the theories of the Law-makers. Revenue Law, Criminal Law, Police, Jail management, Sanitary measures, Water-supplies, have, within the last three or four years, all been officially reported on by all Administrative Officers.

In any administrative reform affecting the people, the Collector has to feel their pulse to ascertain their wants and wishes, and to communicate their views to Government. If any new tax is imposed, and in the past four years

there have been three, the Collector has to organize the whole machinery to test every claim to exemption, and he is answerable for all. It appears to me after eleven years' duty as a District Officer, that the whole machine of our Government is built upon material which at one time or another has been reported on by District Officers.

All the time the Collector has to keep his doors open to all-comers, or he is a mere office hand disposing of his case work only, and a tool in the hands of his Native subordinates. Unless he is accessible to all, he fails in the chief part of his duty. He can never know his people, or be known by them. It is not too much to say that every part of an Indian Executive Administrator's duty depends on this. His personal influence is everything. He educates, leads or drives his people according as their natures require. If he cannot do all this, he is a cypher when the time of trial comes.

A District Officer's trial is most severe as we have lately seen in the time of famine or rebellion. Every District Officer almost within and beyond these provinces has passed through one or both of those phases. In a famine his knowledge, foresight, resource, every administrative faculty is tried to the utmost. He must be as well acquainted with the agriculture and rural economy of his district, as any farmer in it, or

he will be deceived, and deceive others at every turn. He must know something of its geology, and water supply from local and distant sources, or he can give no reliable opinion whether the drought is to be submitted to, or can be modified. In fact, he will be in the most minute particulars what an agent or bailiff is to a landed proprietor in England, only he will have a whole country, say, 2,000 or 3,000 square miles and a million of souls looking to him and him only, for guidance and help; and he will be responsible for every mistake to his Government.

In time of rebellion, if he does not know his district and people and what is more, if they don't know him, he will find the whole collapse and roll up like a scroll in his hands, for he can expect no help from abroad. If he weathers the storm, he will find every duty at once increased and many others added to them. Our Military departments cannot be organized to stand internal rebellion; they are to meet demands abroad, depending on peace at Home. In rebellion they collapse one after the other, and as long as the District Officer holds on, he receives them as they fall in, and somehow or other carries on their duties. He becomes the chief Commissariat Officer, the director of posts, the conductor of all transport service. He provides all carriage for war materials, he furnishes escorts, he improvises some sort of a force, and

keeps open communications; he provides material for all sorts of Military equipments, he furnishes remounts for the cavalry, and recruits for all branches of the service, he supplies the actual sinews of war by loans from wealthy traders, whose instincts are for order, though their sympathies are not with the alien Governor. The strong arm of the Civil power keeps the people down. The positions of District Officers are at once changed. In ordinary times they are many members only of one body. In extraordinary times, they are the props of a falling Government.

In the Punjab and other Non-Regulation Provinces, the District Officer is all that I have attempted to describe, and much more besides. He has largely increased powers as a Criminal Judge, he is the sole Civil Judge of his district. His power is more finite than in the other provinces. In frontier districts he is the Political Agent of the State in all dealings with neighbouring independent tribes. He knows all their secret histories, the endless ramifications of their feuds and friendships, and he plays tribe against tribe. If an inroad occurs, he organises a retaliating expedition Whilst this is preparing, he discharges his usual office duties, until all is reported to be ready, when he lays aside his pen for revolver and sword, and rides the foray with the expedition. He takes his chance with the

rest—a few hard knocks are exchanged on the hill side, a few villages are harried, friendly tribes are let loose on the common enemy, and the submission of the bearded fathers of the invaders of our territory having been obtained, the District Officer returns to resume his pen, and writes a matter-of-fact report on the expedition to Government.

* * * *

Let the system of administration as it exists at present be the first considered. The purport of my writing will be mistaken if I have not succeeded in showing, in my relation of a District Officer's duties, that there is a strange mixture of genuine work, and much that appears to have been thrown on that much-burdened official for no better reason than that he was at all events certain to be available on the spot, that he had means at his disposal which no one else had, and so there was more chance of his doing what was required than there was of any one else doing it.

For argument's sake, let it be assumed that the present system is correct in every way. Certainly, then, it must be conceded that when the Government has obtained the service of an Administrative Officer who has the bodily strength and the many faculties required for the efficient discharge of his endless duties, there can be no greater mistake, no greater waste of

the power at the disposal of Government, no greater injustice to the individual of many qualifications than for the Government to say to him—"When a certain vacancy occurs, you are at once to give up all the duties you have thoroughly mastered and creditably discharged for many years, you shall at once forego your active habits of mind and body; you shall have no longer scope for your foresight and resource, the knowledge you have acquired must be laid by for a season—you must risk the good reputation you have acquired, and acquire what fresh reputation you can by labouring in an office where your qualities, which have commanded success, and which we have esteemed, will be of no avail; you must change your old masters whom you know, and who know you, for other who are strangers, and the whole course of your official life must be changed—or you will be set aside and superseded."

If the present executive administrative system is right, then the manner of promotion from it must be wrong indeed. Rather should it be the object of Government to induce the successful Administrative Officer to remain in that branch of the service, to allow him to advance in the service as if he had accepted promotion in the ordinary course. And as a fact, many Administrative Officers would be found who would accept these terms. Though the work is

desperately hard, still if the body and brain hold out, there is a great charm in active independent life, in the infinite variety of duties, in the great power over the people, and the feeling of general usefulness, which brings its own reward.

On the other hand, there are many, with all qualifications but the bodily strength, who eagerly look forward to the day of their promotion, accepting the new life, the partly strange work and the remote chance of success, as a positive relief from the perpetual worry of their former position as Administrative Officers. These men are half worn out when they enter on their new duties.

Can there be any question that the proper course to pursue would be to admit that there is no advantage, even that there is no necessity to harass the present District Officer, or to disqualify the future Judge, by making him a "Jack of all trades," or a general practitioner. Nothing could be more easy than to assign his miscellaneous duties to the Executive Civil Engineer, the Local Health Officer, the Assistant Quarter-Master General, the Commissariat Officer, the Municipal Officer, each taking what obviously belongs to his department. Then there would remain a more valuable administrator, with leisure for his legitimate duties, and in course of time there would be a better trained Judge.

Even then should the District Officer be thoroughly successful, it would be a mistake to remove him to a Judgeship when his turn came, he should remain, and the State would benefit more by a continuance of his proved good service, than by his removal.

* * * *

I am prepared for the remark that the combination of Civil and Criminal work is bad. That, somehow or other, the Civil Judge's power is impaired, and his reason prejudiced, by his criminal duties and experience. I cannot see that the argument applies to this country. The feeling prevails, and no doubt on good grounds, in England, but it is not so prevalent in continental Europe. To my idea the argument presupposes an amount of weakness, a readiness for sympathy or animosity, which may be found where Judge, Jury, Advocates, witness, or criminals, are of one language, race or religion. But in India it is far different. There is no connecting tie whatever between the alien Judge, and the half-educated, half-enlightened client, or the half-savage criminal. I believe no body of men can be freer from all bias than Indian Judges. What is there to excite their sympathy or animosity? Should by chance one be found overflowing with the milk of human kindness, it will all run off in the early years of his duties, on the numerous objects for his weakness.

Should he be full of hostile tendencies, without temper or discretion, as a fact, his promotion ceases, and shohaeno opportunity to be dangerous.

If this is not admitted, I am prepared with the further argument that the Judge, as a fact, does not see the same person in his different Courts. The criminal is of the lower classes. He is no landowner or tenant, so he is never seen in the Revenue Courts, he has no credit or position to admit of his being a client in a Civil action. Revenue Courts are in fact Civil Courts, but even there the landowner, as a rule, is very seldom seen in the Civil Court, if he is a party in a suit for loan on mortgage of his land for instance, he does not personally appear, and the suit is not of a kind to excite a Judge's sympathies. He is still more seldom seen on the criminal side. It is the same with the frequenters of the Civil Courts; the trader and money-lender stick to their trade, and have little to do with revenue or crime.

Sometimes of course a landed proprietor under the impulse of sudden passion, commits some violent crime, sometimes a money-lender commits perjury, or forgery, in a Civil suit, and is committed for trial in the Criminal Courts, but a system need not be adopted to meet cases of such very rare occurrence. Even in such cases the officer detecting the offence directs its trial bv another officer.

APPENDIX B.

The preceding part of this book was written before the Reformed Legislatures came into being. During its passage through the press, the original manuscript was altered here and there to bring the subject matter into line with recent developments, but it was not possible to introduce major alterations at that stage. It was finally decided to leave the first draft as it stood, with such little alterations as it was possible to make in the page proofs, and to postpone the final publication of the book till the Report of the Bengal Committee was published, in order to bring the subject matter up to date as far as possible. That decision, as it happened, involved a delay of two years—a delay which may make some of the remarks made in the body of the book appear somewhat out of focus. From the foot-note at page 128, it will be seen that it was possible to say, early in 1921, that the question of the separation of Judicial and Executive functions had already been raised in several of the Reformed Legislatures. It would now be more correct to say that the question of the separation of the Executive and the Judicial had been raised in *all* the Reformed Legislatures.

It is impossible here to analyse in any detail either the debates on the subject or the reports of the various provincial committees which were appointed to draw up schemes to give effect to the separation. The debates cover the old familiar ground, but naturally the stock arguments of the supporters of separation are considerably reinforced by both the spirit and the letter of the Reforms. At the moment, the general financial stringency makes the translation into practice of the various schemes which have been drawn up impossible; but the actual carrying out of them would now seem to be only a matter of time. In this Appendix it is only necessary to complete the survey given in the historical section by adding the outlines of the latest scheme enunciated for the province of Bengal. It is impossible to include the recommendations of other committees, the first of which, that of the United Provinces presented its report in 1921; and the last of which, that of the Government of Madras, has only recently been appointed.

The Bengal Committee was appointed on the 19th August, 1921, as the result of a Resolution carried in the Bengal Legislative Council on the 5th April, 1921, to the following effect :—

"This Council recommends to the Government that early steps be taken for the total separation of the judicial from the executive functions in the administration of this Presidency."

The Committee was composed of the following members :—

The Hon'ble Mr. Justice W. E. Greaves, President, Mr. F. C. French, C.S.I., I.C.S., Sir Ashutosh Chaudhuri, Dr. Abdulla Suhrawardy. Raja Manmathanath Rai Chaudhuri of Santosh, and Mr. G. Morgan, members. The Report of the Committee was published as a Supplement to the Calcutta Gazette on December 6th, 1922. The reference to the Committee was "to elaborate a practical working scheme for the separation of executive and judicial functions in the administration of Bengal and to report on the cost thereof." It will be noted that the *principle* of separation was not referred to the Committee, so that the Committee neither took evidence nor reported on that aspect of the question.

The Report of the Committee starts by giving a short historical survey of previous schemes of separation, a subject fairly fully dealt with in the main text. The only variation worthy of note is the special mention of a scheme drawn up by Mr. C. W. Bolton, a prominent member of the Bengal Civil Service, in 1900. Mr. Bolton recommended the appointment in each district of a District Judge to exercise the powers vested in Assistant Sessions Judges under the Criminal Procedure Code. To this Judge Mr. Bolton proposed to give the exclusive power of hearing appeals from Magistrates of all grades,

and also applications for revision of their decisions. This officer, he recommended, should be given general powers of supervisión over the subordinate magistracy; he was to distribute cases amongst them or assign to individual magistrates the duty both of distributing cases and of receiving complaints. Over and above the District Judges, he recommended that there should be Divisional Judges, to control the District Judges, try such criminal cases as the District Judges were not competent to try, and to have the power of transferring cases from one court to another. At each district headquarters he proposed the appointment of Joint, Assistant or Deputy Magistrates, empowered to try criminal cases. These Magistrates were to be appointed normally for a period of five years, and were to be subordinate in all their judicial functions to the District Judge. The District Officer at the same time should be relieved of all his judicial and appellate powers, and powers of supervision and control over the subordinate magistracy, all of which might be vested exclusively in the District Judge subject to the control of the Divisional Judge. In subdivisions Mr. Bolton recommended the creation of two offices, the one to be occupied by a Deputy Magistrate, for judicial work, who might also, if necessary, have charge of the sub-treasury, and the other, by a Deputy Collector, for revenue and executive work.

For the smaller sub-divisions he thought that the union of functions should continue, but the Sub-divisional Officer should be subordinate to the District Judge and the District Officer for his judicial and revenue-executive work respectively. The executive officer of the district, according to Mr. Bolton's scheme, was to be the District Officer, who, he proposed, should be given the preventive powers arising out of the Criminal Procedure Code, the supervision of this part of his work remaining with the Divisional Commissioner.

It will be seen that the main ideas of Mr. Bolton's scheme are brought out in the other schemes which have been examined; indeed, Mr. Bolton's scheme was submitted originally as a criticism of Mr. R. C. Dutt's plan. It may be added that that Mr. Bolton estimated the net increase in the cost of administration likely to result from his scheme at about five lakhs per annum, exclusive of the cost of buildings.

After a further analysis of the existing system of administration, the Committee proceed with their own scheme. "We see no practical difficulty in effecting a separation of judicial and executive functions," they say, "but we think that in framing any scheme it is desirable—

(1) that the separation should be as complete as possible;

(2) that it should disturb existing conditions as little as possible; and

(3) that, so far as is consistent with efficiency, any increase of cost should be minimised as far as possible."

With these guiding principles, the Committee recommend the following scheme:—

(*a*) The hearing of appeals from magistrates with second and third class powers should in future take place not before the District Officer or his subordinates, but before the District and Sessions Judge or some purely judicial officer empowered in that behalf.

(*b*) The inspection of criminal courts should be made in future not by the District Officer or his subordinates, but by the District and Sessions Judge or by some purely judicial officer empowered in that behalf, and the responsibility for the efficient working of all the criminal courts in the district and the due despatch of criminal business should rest in future not with the District Officer but with the District and Sessions Judge. We desire to emphasise the necessity of the inspection and supervision of the work of the criminal courts being ordinarily carried out by the District and Sessions Judge himself. Unless this is done, we think that there is a grave risk that the criminal work of the districts may deteriorate.

(*c*) The present staff of Deputy Magistrates Deputy Collectors and of Sub-Deputy Magistrates

and Sub-Deputy Collectors should be divided into two branches, and one should be employed in purely judicial work and the other in purely administrative, executive and revenue work. The control and supervision, including questions of promotion and transfer, of those engaged in purely judicial work should lie exclusively with the judicial authorities and the control and supervision of those engaged in purely administrative work should remain with the District Officer. If and when the scheme is adopted, regard should be had, where possible, to the wishes of the various members of the staff as to the branch to which they should be assigned. After the division is effected, we think that there should be no change for the present in the location of the magisterial staff, that is to say, that they should continue, where possible, to occupy their existing courts and rooms, whether at the sadar or the subdivision. We see no practical difficulty in the District and Sessions Judges, or whoever supervises and inspects their work, carrying out these duties at the sadar and sub-divisional offices. To remove these officers at once to the Judge's court house would greatly increase the cost of any scheme; but, where additional accommodation is necessitated by the scheme, it should be provided at the Judge's court house rather than at the District Officer's, and ultimately all judicial officers, civil and

criminal, at head-quarters should be located in the Judge's court house.

(*d*) In future recruitment for the Bengal Civil Service and the Subordinate Civil Service should be made direct to the judicial branch and direct to the administrative, executive and revenue branch, change from one branch to the other not being permitted. Some members of the Committee, however, think that change from one branch to the other should be permitted for a period of five or six years, as thereby the wider experience thus gained would be beneficial to both branches.

(*e*) As regards future members of the Indian Civil Service posted to Bengal, we think that their selection of judicial or executive should be finally made at the expiration of six years' service, those first six years being treated as training and the officer, etc., being deputed for substantial periods to one branch or the other. We are aware that proposals have been made from time to time with regard to the improvement of the judicial training of members of the Indian Civil Service, but we do not think that it is within the scope of the reference to this Committee to consider and come to a conclusion upon this question. Some members of the Committee, however, think that in future recruitment for the Indian Civil Service should be made direct for the judicial branch and direct for the revenue, administrative and executive branch.

(*f*) The High Court should exercise the same control and supervision over the magisterial staff as they now exercise over the civil staff.

On the all-important subject of the preventive sections of the Criminal Procedure Code, the Committee made the following remarks:—

An important question arises which it will be convenient to deal with in a separate paragraph from the other details of the scheme. This question concerns the preventive sections of the Criminal Procedure Code which are contained in Chapters VIII to XII inclusive of that Code. Under the present system the powers under these sections are vested in the District Magistrate, the Subdivisional Officer and magistrates with first class powers empowered in that behalf. In Mr. Mitter's scheme these powers were to be taken away from the District Magistrate and from the magistrates under him and transferred to the District and Sessions Judge and to the judicial officers under him; in Mr. Bolton's scheme and in Sir Harvey Adamson's scheme these powers were to be retained by the District Officer and by officers under him. The Committee have heard a considerable amount of evidence on the question of the retention or otherwise by the District Officer and those under him of the present powers given them by the preventive sections. As already stated, they have examined the District Officers of nine

districts orally. All these officers consider that the powers under these sections should remain as at present with the District Officer and those under him; three of them, however, see no objection to the trial of all cases under these sections being transferred to the District and Sessions Judge or those under him, provided there is no delay. As regards the views of the remainder, three see no objection to trials under section 107 taking place before a judicial officer, four see no objection to trials under section 110 taking place before a judicial officer, provided the trial be held locally, five would not object to motions against conditional orders passed under section 133 being heard by a judicial officer, and five would not object to section 145 proceedings taking place before a judicial officer. The two District and Sessions Judges whom we examined both thought that the power of initiating or drawing up proceedings under these sections should remain as at present, but that the hearing should take place before a judicial officer. The Divisional Commissioner whom we examined thought that all cases under these sections should be tried by a judicial officer, while the Additional District Magistrate whom we examined would retain as at present all powers under these sections, except that he would allow cases under sections 109, 110 and 145 to be tried by a judicial officer. Two of the three Subdivisional Officers would

retain the powers as at present, whilst the other would retain the powers under sections 133, 144 and 145 for urgent cases, letting the other powers be exercised by a judicial officer. Of the two barristers whom we examined, one of whom, as stated, is an *ex*-Deputy Magistrate with experience in the subdivisions, one would give all the powers to the District and Sessions Judge and the other would have the hearing of all proceedings before a judicial officer.

Of the two pleaders examined, both would leave the initiation of proceedings with the District and Subdivisional Officers, subsequent proceedings to take place before a judicial officer. One would, however, leave the District and Subdivisional Officers their powers under section 144 unimpaired, and saw no objection to their passing emergency orders under the other sections. The other saw no objection to the District and Subdivisional Officers passing orders under sections 133 and 144, provided that such orders could be subsequently challenged in courts of law. This witness was opposed to trials of section 110 cases taking place locally, thinking that the accused was thereby prejudiced in obtaining legal assistance.

Of the seventeen District Magistrates whom we did not examine orally but who replied to the questionnaire, all were in favour of the District Officer and those at present exercising powers

under these sections retaining the power to initiate proceedings; twelve of them, however, saw no objection to the trial of proceedings under these sections being before a judicial officer.

Of the associations whose opinions we invited, one only dealt with this question, expressing the opinion that the power of initiation should remain as at present in urgent cases, but that proceedings under sections 107, 108, 110, 133, 144 and 145 should take place before a judicial officer.

In some of the oral evidence which we have taken and in some of the replies which we have received, some stress has been laid upon the fact that the powers under these sections are in the nature of executive acts, and that the proceedings are only *quasi*-judicial. As the District and Subdivisional Officers will, under the scheme submitted, still remain liable for the peace and order of the districts, it would manifestly be impossible to deprive them of these powers entirely, at the same time it seems to us impossible to say that the proceedings thereunder are not, at any rate at some stages, judicial proceedings. Consequently, if things remained as at present, executive officers would still be exercising some judicial functions and the separation of functions would not be complete. At the same time it is impossible always to be strictly

logical and, if we were satisfied that the peace and order of the district depended on things remaining as at present as regards the preventive sections, we should not hesitate so to recommend, even if thereby some executive and judicial functions overlapped.

After considering the evidence, we recommend that the powers of the District Officer and those under him under the preventive sections shall be modified in the following manner :—

(1) In ordinary cases under sections 107, 108, 109 and 110, when the District Officer requires a person to show cause, the proceedings shall be sent for trial before a judicial officer, but in cases of emergency which arise under these sections and when immediate action is necessary, it shall be open to the District Officer and those empowered to act under these sections themselves to make orders under the sections, but, where they make such orders, they shall state their reasons in writing and an appeal against the orders shall lie to the District and Sessions Judge. The Committee are agreed that all cases under section 110 should be tried locally as at present and that opportunity for obtaining legal assistance should be freely given.

(2) Section 137 shall be modified so as to provide that, if a person bound down conditionally under section 133 appears to show cause, the proceedings shall be heard before a judicial

officer, but, if the order is made absolute, the District Officer shall be the person to enforce it under section 140 and the following sections.

(3) The hearing of proceedings under sections 145 and 147 shall be before a judicial officer, initiation of proceedings and the power to make provisional orders under the last proviso of section 145 (*4*) remaining as at present with the District Officer and those under him.

(4) Any appeal under section 406 of the Criminal Procedure Code shall go to the District and Sessions Judge.

If these suggestions are adopted, it will be necessary, in order to secure speedy disposal of cases, that the District Officer should forward the proceedings to the District and Sessions Judge with a request that they should be speedily disposed of, and that a High Court order should require the District and Sessions Judge to give effect to the request and secure the speedy disposal of all matters thus marked as urgent.

To the Committee's recommendations on this point, one member, Raja Manmathanath Rai Chaudhuri of Santosh, dissented, in the following note :—

"It is not without regret that I submit this note of dissent on a vital point, with regard to which my colleagues and I could not see eye to eye, or even effect a settlement satisfactory to

all. My regret is all the more, as throughout our labour we were able to square our differences and come to an agreement in every matter which came up before us for decision.

The difference, which has resulted in this note of dissent, is with regard to the preventive sections of the Criminal Procedure Code which are contained in Chapters VIII to XII inclusive of that Code.

I am of opinion that the powers under these sections should be taken away from the executive officers and transferred to the District Judges and judicial officers under them. I am prepared to allow the executive officers to retain the power of initiating or drawing up proceedings under these sections, but the hearing should take place before a judicial officer.

I am not unmindful of cases of emergency, which may arise under these sections, necessitating immediate action, but I do not see any reason why such cases will not be expeditiously dealt with by judicial officers, if there be a High Court order, as recommended by us in the report, requiring judicial officers to speedily dispose of all matters marked as urgent by executive officers.

If, however, the Government think that in the interest of law and order the executive officers should be allowed themselves to make orders under sections 107, 108, 109 and 110, in cases of emergency, I should certainly like to restrict such

powers to the District Officers and to the Subdivisional Officers only. By this I mean that officers under them should under no circumstances be empowered to make orders under these sections. I should also like to provide that such orders of the District Officer should always be revised by the District Judge, and those of the Subdivisional Officers by the subdivisional judicial officers, so that the convicted parties may obtain immediate relief on the spot, if law is on their side. Such a provision will virtually give the District and Subdivisional Officers power to make only *conditional* orders, in cases of emergency which may arise under these sections. When I urge for it, I certainly do not apprehend injustice in the hands of the executive officers, but I really do so as, in my opinion, no separation of the judicial and executive functions can be properly effected without transferring the powers under the aforesaid preventive sections from the executive to the judicial officers.

I am also opposed to the executive officers being vested with the power to make provisional orders under the last proviso of section 145(*4*).

The Committee go into considerable detail on the subject of the cost of the proposed scheme. It may be recalled that the cost of Mr. R. C. Dutt's scheme had been calculated at about eleven and a half lakhs recurring and four lakhs non-recurring expenditure. The recent

Committee is much more merciful. They sum up the cost of their proposals thus :—

Recurring Expenditure.

	Rs.
At headquarters—	
Personnel (gazetted staff) ...	38,040
Additional clerical assistance ...	12,500
Additional process-serving staff ...	12,500
In subdivisions—	
Personnel (gazetted staff) ...	2,84,460
Additional clerical assistance ...	12,500
Additional process-serving staff ...	12,500
Housing allowance	32,400
Cost of assistance to District Judges by reason of the transfer of appeals, inspection, etc., and cost of the additional clerical staff occasioned by the creation of new District Judgeships ..	1,54,750
	5,59,650
Savings by abolition of Additional District Magistrates	48,000
Net additional recurring cost	5,11,650
Savings by utilising Circle Officers for opening sub-treasuries	63,000
Total net recurring expenditure ...	4,48,650

Non-recurring expenditure (buildings).

	Rs.
At headquarters	14,000
In subdivisions	1,03,000
To District Judges' courts	36,000
Total non-recurring cost ...	1,53,000

This sum does not include the cost of the extra assistance required by the High Court by reason of the scheme, a cost reported by the High Court as likely to be considerable. As against this has to be set a possible saving to be effected in the staff of the Local Government which now deal with the work. The estimates, of course, are only approximate, but it may be borne in mind that they are post-War figures. The modesty of the recent scheme is a decided contrast to the expansive hopes of the pre-Reform times.

To sum up, the position now is that not only has the principle of separation been accepted throughout India, but each Local Government has also worked out (or is working out) a scheme to give effect to the separation. Each scheme costs money, and each province is exploring the possibilities of retrenchment. The same Councils which have again set the wheels in motion have to find the money to oil them, and the ardour for reform, even if it has not been tempered by the strenuous times that have been lived these past three years, must for some time be cooled by the very natural desire of the Councils to incur no new expenditure which may mean fresh taxation of the people.

INDEX

A

B

C

D

E

F

G

H

I

J

K

L

M

N

P

R

S

W